

Clause 1 The Contract

1.1 Definitions

In the Contract (as defined below) the words and expressions defined below shall have the meanings assigned to them, except where the context requires otherwise:

Sub-Clause 1.1 consists of a number of definitions used throughout the contract documents, set out in six groups by subject matter. The defined terms are readily identifiable by their capital initial letters. All tender documents should be consistent in their use of these defined words and expressions.

1.1.1 Documents

1.1.1.1 *“Contract” means these Conditions of Contract (Parts I and II), the Employer’s Requirements, the Tender, the Contractor’s Proposal, the Schedules, the Letter of Acceptance, the Contract Agreement (if completed) and such further documents as may be expressly incorporated in the Letter of Acceptance or Contract Agreement (if completed).*

This first definition prescribes which documents are to form the Contract, unless it is otherwise defined in the Contract Agreement; the order of precedence is specified in Sub-Clause 1.6. The contract documents are then defined, in terms which indicate what they are expected to contain. However, mentioning these expected contents may have little effect. When the Contract comes into force, the Contract consists of the actual documents, and it is their contents which are relevant, not the contents indicated in these definitions. Thus, for example, these definitions cannot prescribe the extent of detail required in the Proposal, which comes into existence before this Clause comes into effect.

1.1.1.2 *“Employer’s Requirements” means the description of the scope, standard, design criteria (if any) and programme of work, as included in the Contract, and any alterations and modifications thereto in accordance with the Contract.*

The Employer’s Requirements is the document where the Employer specifies precise requirements for the completed Works, including all matters not covered by the Conditions of Contract. The Employer’s Requirements is the base document which includes: the definition of the location of the Site, the definition and purpose of the Works, quality and performance criteria, details such as those listed on page 3 of the published Part II, and the Contractor’s particular obligations (training of personnel to operate the Works, for example), in addition to any prescribed in the Conditions of Contract. If these matters are specified elsewhere (in the Instructions to Tenderers, for example), and are therefore not contractually binding, they would be superseded by the Proposal.

The Employer's Requirements should define the Site and the Works, which may require the inclusion of drawings. If the proposed Works are outlined on drawings, either dimensioned or otherwise, the Employer's Requirements should define the extent to which (for example) the Works to be executed by the Contractor must comply with the outline. The incorporation of design aspects into this document should be carried out with care, with full consideration being given to the consequences, including any ultimate responsibility for this design by the Employer.

The Employer's Requirements should include all relevant criteria, including quality, performance and testing, but need not specify any matters which would be imposed on the Works by the applicable law. Quality should be specified in terms which are not so detailed as to reduce the Contractor's design responsibilities, not so imprecise as to be difficult to enforce, and not reliant on the future opinions of the Employer's Representative, which tenderers may consider impossible to forecast. For example, specifying "best quality", or other imprecise standards of quality, can give rise to dispute, because the parties may interpret these standards differently; see the above comments on Tendering Procedure (page 12). Further guidance relevant to the preparation of the Employer's Requirements is included in the published Part II, and throughout this Guide.

The Employer's Requirements may also (but need not) include a "programme of work", if the Employer actually requires the Contractor to adhere to particular programme requirements. For example, if the Works include work on an existing facility, the Contractor might be required to phase the work in a particular way in order to minimise the disruption to the continuing operation of the facility (which might be a process plant); see also Sub-Clause 2.2. For most works on previously-unoccupied (green-field) sites, there may be no need for this type of requirement, the time constraints being those arising from Clause 8.

Prior to accepting the Tender, the Employer should consider whether there is any inconsistency between any tender documents; if so, it should be resolved. In particular, if there are any details in the Proposal or Schedules which are inconsistent with particular aspects of the Employer's Requirements, the inconsistency should be resolved by an agreed amendment. Anticipating this possibility, each of definitions 1.1.1.2, 1.1.1.5 and 1.1.1.6 refers to the version of the document "as included in the Contract".

1.1.1.3 "Tender" means the Contractor's priced offer to the Employer for the Works, as accepted by the Letter of Acceptance.

1.1.1.4 "Appendix to Tender" means the completed appendix comprised in the Tender.

The Tender, and the Appendix to Tender, should be based on the example form in the third part of the Orange Book, as published and as reproduced at the end of this Guide. The Tender constitutes the tenderer's offer to enter into a legally-binding contract. It is not a lengthy document, but is important because, as agreed by the Letter of Acceptance,

it is the means by which a legally-binding Contract comes into effect, unless and until the Employer and Contractor enter into a Contract Agreement.

The main page of the Tender starts by identifying the tender documents (including any Addenda thereto) and the fixed lump sum price, which may be a total of a breakdown in a Schedule. In many countries, the written price will prevail over the amount expressed in figures.

The second paragraph refers to the appointment of the Dispute Adjudication Board: see Sub-Clause 20.3.

The third paragraph states the date up to which the Tender is valid for acceptance. This validity date should be assessed by the Employer, taking account of his procedures and the time necessary for adjudication of tenders, including studying tenderers' design proposals. In some countries, the validity undertaking may be unenforceable, other than through the calling of the tender security.

The Appendix to Tender is referred to in the many Sub-Clauses which require specific data in order for them to become effective: this data includes the parties' names and various amounts and percentages. There is no indication whether data is to be provided by the Employer, prior to issuing the tender documents, or by the tenderer. When preparing the Appendix to Tender, the Employer has to decide what items to complete. Generally, he would include data for Sub-Clauses 1.1.2.1, 1.1.2.3, 1.4, 1.8, 2.2, 4.2, 8.6, 11.4, 18.1 and 18.3 as a minimum, and would probably include (in the Instructions to Tenderers) any criteria relevant to the completion of some of the other items. However, he might prefer to complete all items other than 1.1.2.2 and the tables.

1.1.1.5 "Contractor's Proposal" means the preliminary design submitted with the Tender, as included in the Contract.

The Contractor's Proposal is the document containing the tenderer's preliminary design, which he prepared and submitted with his Tender. There is no indication whether the preliminary design is only a small-scale outline, or includes fully detailed working drawings. The Employer cannot insist on either, because a contract has not become effective, but he may define (in the Instructions to Tenderers) what will constitute a responsive tender. Either party might, on the one hand, prefer an outline, in order to minimise the costs of tendering and/or of the adjudication of tenders; on the other hand, either party might prefer detailed drawings, in order to reach agreement on the details. Although the Employer can specify what will constitute a responsive tender, tenderers will be reluctant to carry out a costly, detailed preliminary design if they consider that they have little chance of recovering their costs through being awarded the contract.

The tenderer should identify any aspects where he proposes not to comply with any particular aspect of the Employer's Requirements, so that these deviations can be resolved before the Tender is accepted. If deviations are not identified, and thus are not clarified in the Contract, the Employer's Requirements take precedence: see Sub-Clause 1.6. However, if the Contractor's Proposal includes clarification of any matter (for

example, quality assurance details) which is incorporated into the Contract and is consistent with the other Contract documents, the matter becomes an obligation and either party can enforce it.

Prior to accepting the Tender, the Employer should consider whether there is any inconsistency between any tender documents; if so, it should be resolved. In particular, if there are any details in the Proposal or Schedules which are inconsistent with particular aspects of the Employer's Requirements, the inconsistency should be resolved by an agreed amendment. Anticipating this possibility, this (and the next) definition refers to the version of this document "as included in the Contract".

1.1.1.6 "Schedules" means the information and data submitted with the Tender, as included in the Contract.

1.1.1.7 "Schedule of Payments" means the Schedule designated as such (if any), referred to in Sub-Clause 13.4.

The Schedules may include a questionnaire, tables and/or lists prepared by the Employer, issued with the tender documents and completed by the tenderer. The form of the Schedules will depend on the type of Works and the information and data which the Employer requires, both for the adjudication of tenders and for inclusion in the Contract. Typically, the Schedules might include some of the following:

Schedules of Technical Particulars

Schedule of Designers

Schedule of Subcontractors

Schedules of Supply-Only Materials/Plant/Spares/Tools/etc

Schedule of Payments

Schedule of Provisional Sums

Schedule of Insurances (General Terms)

Schedule of Dispute Adjudication Board membership

If the Schedules, as incorporated into the Contract, define any matter consistent with the other Contract documents, the matter becomes an obligation and either party can enforce it.

1.1.1.8 "Letter of Acceptance" means the formal acceptance by the Employer of the Tender.

1.1.1.9 "Contract Agreement" means the contract agreement (if any) referred to in Sub-Clause 1.5.

The Letter of Acceptance is the document whereby the Employer accepts the Tender. In some countries, if it only says "For and on behalf of . . . we accept your Tender reference . . ." the Contract may become effective immediately, unless the tenderer

had included more than one option, with the result that the quoted words would not make it clear what was being accepted.

The Contract Price is defined (in 1.1.5.1) as the sum stated in the Letter of Acceptance. The Letter must therefore specify the Contract Price, identify which of any options are to apply, and list the documents which are to constitute the Contract. This wording may actually constitute a “counter-offer”, because it incorporates changes which have only been agreed tentatively: it is not accepting the original Tender as submitted. Following a counter-offer Letter of Acceptance, the Contract only becomes effective when it has been unreservedly accepted by the tenderer.

In the event of protracted negotiations, it may be necessary for a memorandum of understanding to be jointly agreed, for inclusion in the Letter of Acceptance. The memorandum would record the outcome of any post-tender discussions and correspondence, including clarification of any inconsistency between tender documents.

When the Contract becomes effective, the tenderer becomes the “Contractor”, and his Proposal becomes the “Contractor’s Proposal”, subject to any accepted changes thereto which are incorporated in the Letter of Acceptance.

Even if the applicable law does not necessitate a Contract Agreement, the latter is often considered advisable, in order to record what constitutes the Contract. A hasty award may give rise to problems (in the event of a future dispute) over the meaning and inter-relationship of post-tender pre-award communications. Although neither party can insist on a change in the Contract, they should be able to agree how these communications may be consolidated into coherent documentation.

1.1.2 Persons

1.1.2.1 “Employer” means the person named as such in the Appendix to Tender and the legal successors in title to such person, but not (except with the consent of the Contractor) any assignee of such person.

1.1.2.2 “Contractor” means the person whose Tender has been accepted by the Employer and the legal successors in title to such person, but not (except with the consent of the Employer) any assignee of such person.

1.1.2.3 “Employer’s Representative” means the person appointed by the Employer to act as Employer’s Representative for the purposes of the Contract and named as such in the Appendix to Tender, or other person appointed from time to time by the Employer and notified as such to the Contractor.

1.1.2.4 “Contractor’s Representative” means the person (if any) named as such in the Contract or other person appointed from time to time by the Contractor under Sub-Clause 4.3.

The parties to the Contract are the Employer and the Contractor, and not any assignee to which the other party has not given prior consent. Under Sub-Clause 1.8, consent shall be in writing and not be unreasonably withheld or delayed. It is advisable to take legal advice before seeking or giving consent to an assignment.

Each party will have its Representative, who may be named in the tender documents and thus in the Contract. The Employer should name his Representative in the Appendix to Tender; the tenderer may propose his Representative in his Proposal or Schedule. Each party can appoint a replacement Representative, but the appointment of the Contractor's Representative is subject to the prior consent of the Employer's Representative under Sub-Clause 4.3.

Each party could be a firm, corporation or other "legal person", under Sub-Clause 1.3. Similarly, the Employer's Representative may be an individual or a firm or corporation: for example, a firm of independent consulting engineers.

1.1.2.5 "Subcontractor" means any person named in the Contract as a subcontractor, manufacturer or supplier for a part of the Works or any person to whom a part of the Works has been sub-contracted in accordance with Sub-Clause 4.5, and the legal successors in title to such person, but not any assignee of such person.

It is not envisaged that the Contract will necessarily identify every subcontractor, manufacturer and supplier, but some may need to be recorded at this stage, when the parties enter into the Contract. Part I contains no provisions for the procedures under which the Employer nominates a Subcontractor, because of the problems associated with design responsibility and the perceived inconsistency between this nomination procedure and contractor-designed works.

1.1.2.6 "Dispute Adjudication Board" means the person or persons named as such in the Contract, or other person or persons appointed from time to time under Sub-Clause 20.3.

See the comments on Clause 20 and the Model Terms of Appointment reproduced thereafter.

1.1.3 Dates, Times and Periods

1.1.3.1 "Base Date" means the date 28 days prior to the latest date for submission of the Tender for acceptance by the Employer.

1.1.3.2 "Effective Date" means the date on which the Contract entered into legal force and effect.

1.1.3.3 "Commencement Date" means the date on which the Contractor receives the notice to commence issued by the Employer's Representative under Sub-Clause 8.1.

Three dates are defined, on which all time-related matters are to be based. Administration of the Contract may be facilitated by redefining these dates, in the Contract Agreement, as particular calendar dates. Part I generally refers to the Base Date as the reference date of the information available at time of tender.

In many countries, the Effective Date will be when the Letter of Acceptance is issued. However, Part I does not incorporate this definition in case it is inconsistent with the laws of other countries; under any law, the Effective Date will be definable precisely. FIDIC acknowledges that some provisions in Part I may have different consequences in different legal jurisdictions.

1.1.3.4 “Time for Completion” means the time for completing the Works or a Section (as the case may be), and passing the Tests on Completion, as stated in the Appendix to Tender (or as extended under Sub-Clause 8.3), calculated from the Commencement Date.

1.1.3.5 “Contract Period” means the period from the Commencement Date to the date 365 days after the date on which the whole of the Works shall have been completed as certified by the Employer’s Representative under Clause 10 (or as extended under Sub-Clause 12.3).

In some previous forms of contract, the period after completion was given a name which gave an incorrect implication of the Contractor’s responsibilities; the definition of “Contract Period” avoids any implication. The Contract Period is the actual period up to completion (not the Time for Completion) of the whole of the Works, plus a defects liability period of 365 days. If the latter period is to be other than 365 days, the contract Part II can amend this definition accordingly.

The effect of this definition is that the defects liability period for completed Sections will be more than 365 days, because the Contractor’s liability to rectify a defective Section extends to the same date as applies to defects in the other parts of the Works. This extra liability period may seem onerous, but it removes some potential anomalies. If the Employer finds a tenderer keen to amend this provision, he may be suspicious that the tenderer expects to provide a Section which contains defects which will not become apparent during the first 365 days after completion and taking over.

If the Employer requires to take over the Works in stages, he should define each Section in the Appendix to Tender. It is usually preferable for the definitions of the Sections to be such that they do not together constitute the whole of the Works; the Appendix to Tender would define (i) a Time for Completion for each Section, and (ii) the Time for Completion of the whole of the Works. If the Works are divided totally into Sections, with every part of the Works being part of one or other Section, it is possible (but bad practice) for there to be no Taking-Over Certificate for the Works. In this (avoidable) event, if a Taking-Over Certificate has been issued for each Section, “the date on which

the whole of the Works shall have been completed as certified by the Employer's Representative under Clause 10" can be derived from the effect of all Taking-Over Certificates, thus defining the Contract Period. However, it is advisable to avoid this method of derivation, by the issue of a Taking-Over Certificate for the Works.

1.1.3.6 "day" means a calendar day and "year" means 365 days.

Since "day" means any (working or non-working) day from midnight to midnight, time periods specified in days commence on the beginning of the day following the date of the act which constitutes the starting-point. However, "year" is any 365 days, not the calendar year from 1 January to 31 December; time periods specified in years commence on the beginning of the day following the date of the act which constitutes the starting-point, and not from the beginning of the next calendar year.

1.1.4 **Tests and Completion**

1.1.4.1 "Tests on Completion" means the tests specified in the Contract and designated as such, and any other such tests as may be agreed by the Employer's Representative and the Contractor or instructed as a Variation, which are to be carried out before the Works or any Section are taken over by the Employer.

1.1.4.2 "Taking-Over Certificate" means a certificate issued under Clause 10.

1.1.4.3 "Tests after Completion" means the tests specified in the Contract and designated as such, which are to be carried out after the Works or any Section are taken over by the Employer.

1.1.4.4 "Performance Certificate" means the certificate issued by the Employer's Representative under Sub-Clause 12.9.

The Employer's Requirements should describe the Tests on Completion and the Tests after Completion which he considers necessary to demonstrate that the Plant and other Works satisfy the prescribed criteria: see Clauses 9 and 11. The Tests on Completion are the ones which will demonstrate whether the Plant and other Works can be taken over by the Employer; both types of tests would demonstrate whether their operation complies with prescribed performance criteria, so they may all be called "performance tests". The latter phrase is not used in Part I, which merely assumes the following sequence of events:

- (i) the Contractor completes the Section or Works;
- (ii) the Contractor carries out the tests defined as the Tests on Completion;
- (iii) the Employer takes over the Section or Works; and
- (iv) the Employer carries out the tests defined as the Tests after Completion.

Put another way, it is necessary to decide on the details and timing of each test, before

deciding whether it is to be one of the Tests on Completion or one of the Tests after Completion. For example, if the Employer requires all performance tests to be passed before his Taking-Over, they may all be classified as Tests on Completion; and either there might be no Tests after Completion, or they might be repetitions of (some or all of) the Tests on Completion. For some types of Works, it may be appropriate for the Employer's Requirements to specify the extent of the Employer's participation in performing the Tests on Completion, and/or the Contractor's participation in performing the Tests after Completion.

When specifying these Tests, it may be necessary to consider the likely effect of any relevant factors at the time of testing. For example, a Section may need to be tested when adjacent parts of the Works are incomplete, or testing may be required to be carried out at a time when conditions (such as river flows) are below the design criteria.

1.1.5 Money and Payments

1.1.5.1 "Contract Price" means the sum stated in the Letter of Acceptance as payable to the Contractor for the design, execution and completion of the Works and the remedying of any defects in accordance with the provisions of the Contract.

Since the "Contract Price" is defined as the amount agreed by the Letter of Acceptance, it will probably not be the final amount due under the Contract (for example, because of Variations). Adjustments are described as being added to, or deducted from, the Contract Price.

For this type of contract, the Contract Price is usually a lump sum and is not subject to remeasurement: see Sub-Clause 13.1. It is sometimes considered appropriate for the lump sum to be two or more separate sums, one in each of the currencies of payment. In this case, the Contract Price may actually be expressed as the total of these sums, without converting them to a single currency amount using defined rate(s) of exchange: for example, six million francs plus two million dollars.

1.1.5.2 "Local Currency" means the currency of the Country.

1.1.5.3 "Foreign Currency" means a freely convertible currency, named in the Appendix to Tender as a currency in which part of the Contract Price is payable, but not the Local Currency.

Currencies of payment, including Foreign Currency (or Currencies), are to be specified in the Appendix to Tender, either by the Employer or (subject to the Instructions to Tenderers) by each tenderer.

1.1.5.4 "Retention Money" means the accumulated retention monies retained by the Employer under Sub-Clause 13.3.

1.1.5.5 "Provisional Sum" means a sum (if any) specified in the Contract and designated as such, for the execution of any part of the Works or for the supply of Plant, Materials or services.

Provisional Sums are the subject of Sub-Clause 14.5, which will only apply if Provisional Sums are specified in the Contract: in the Employer's Requirements, the Contractor's Proposal or a Schedule.

1.1.5.6 "Cost" means all expenditure properly incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.

"Cost" is defined as including overhead charges, but profit is excluded. Overhead charges may include reasonable financing costs incurred by reason of payment being received after expenditure. In some countries, financing costs might be due even though the Contractor had sufficient funds at his disposal, and therefore had no need to borrow.

1.1.5.7 "Interim Payment Certificate" means any payment certificate issued by the Employer's Representative under Clause 13, other than the Final Payment Certificate.

1.1.5.8 "Final Payment Certificate" means the payment certificate issued by the Employer's Representative under Sub-Clause 13.13.

1.1.5.9 "Final Statement" means the agreed statement defined in Sub-Clause 13.11.

Note that the "Final Statement" is defined as the agreed statement, not the Contractor's draft final statement.

1.1.6 Other Definitions

1.1.6.1 "Construction Documents" means all drawings, calculations, computer software (programs), samples, patterns, models, operation and maintenance manuals, and other manuals and information of a similar nature, to be submitted by the Contractor.

The Construction Documents are defined as all drawings, etc, which are "to be submitted by the Contractor"; they may include documents on paper and electronic media. The Employer's use of these documents is constrained by Sub-Clause 1.10. If the submission requirements of Sub-Clauses 5.2, 5.5, 5.6 and 5.7 are to be fully effective, a more detailed definition of the documents to be submitted must be included in the Contract: either in the Employer's Requirements or in the Contractor's Proposal.

The Employer's Requirements should describe the extent of detail required for the submissions to the Employer's Representative, who may not want to review every minor detail. For example, the Employer's Representative may only want to receive the general arrangement drawings; he may also want to review drawings of the reinforcement for concrete; and he might even want to receive the bending schedules detailing this reinforcement, although he would then have to ensure that sufficient staff were available to review them. See Sub-Clause 5.2.

1.1.6.2 *“Variation” means any alteration and/or modification to the Employer’s Requirements, which is instructed by the Employer’s Representative or approved as a variation by the Employer’s Representative, in accordance with Clause 14.*

Variations are defined as any change to the Employer’s Requirements, the change having been instructed or approved under Clause 14. Therefore, Part I does not need to contain provisions empowering the Employer’s Representative to change specific requirements (e.g., tests) which are to be specified in Employer’s Requirements. Clause 14 provides the procedures for amending anything specified in the Employer’s Requirements, and the consequences in respect of time and payment. It is advisable to seek prior agreement of the consequences of each Variation, especially if it affects the scope or purpose of the Works, but it may not be possible to do so. See comments on Clause 14.

1.1.6.3 *“Works” means the Permanent Works and the Temporary Works or either of them as appropriate.*

1.1.6.4 *“Permanent Works” means the permanent works to be designed and executed in accordance with the Contract.*

1.1.6.5 *“Temporary Works” means all temporary works of every kind (other than Contractor’s Equipment) required for the execution and completion of the Works and the remedying of any defects.*

1.1.6.6 *“Plant” means machinery and apparatus intended to form or forming part of the Permanent Works, including the supply-only items (if any) which are to be supplied by the Contractor as specified in the Contract.*

1.1.6.7 *“Materials” means things of all kinds (other than Plant) to be provided and incorporated in the Permanent Works by the Contractor, including the supply-only items (if any) which are to be supplied by the Contractor as specified in the Contract.*

1.1.6.8 *“Contractor’s Equipment” means all machinery, apparatus and other things (other than Temporary Works) required for the execution and completion of the Works and the remedying of any defects, but does not include Plant, Materials, or other things intended to form or forming part of the Permanent Works.*

1.1.6.9 *“Section” means a part of the Works specifically defined in the Appendix to Tender as a Section (if any).*

1.1.6.10 *“Site” means the places provided by the Employer where the Works are to be executed and to which Plant and Materials are to be delivered, and any other places as may be specifically designated in the Contract as forming part of the Site.*

1.1.6.11 “Country” means the country in which the Works are to be executed and to which Plant and Materials are to be delivered.

When preparing the tender documents, the Employer may wish to consider whether he will be taking over the Works in stages. If so, he should define each Section in the Appendix to Tender, and include the table shown at the end of the example Appendix, as published and as reproduced at the end of this Guide. Precise geographical definitions of Sections are advisable, so that the extent of the parties' responsibilities after taking over are clear.

It is usually preferable for the definitions of the Sections to be such that they do not together constitute the whole of the Works. The Appendix to Tender would define (i) a Time for Completion for each Section, and (ii) the Time for Completion of the whole of the Works. See the comments after Sub-Clause 1.1.3.5, above.

If no Sections are defined in the Appendix to Tender, the Part I provisions relating to Sections will not apply.

1.2 Headings and Marginal Notes

The headings and marginal notes are not part of these Conditions, and shall not be taken into consideration in their interpretation.

The headings and marginal sub-headings are inserted for the convenience of the reader, and do not influence the meaning of the text.

1.3 Interpretation

Words importing persons or parties shall include firms and corporations and any organization having legal capacity. Words importing the singular also include the plural and vice versa where the context requires. Words importing one gender also include other genders.

Unless inconsistent with the context, the word “person”, and other words normally taken as indicating a person or persons, may refer to an individual or to a firm, corporation or other organization having legal capacity. This principle applies throughout the Contract. Where reference is intended to relate to an individual only, and where a reference is intended to relate to either singular or plural (but not both), the references have to be expressed clearly. The final sentence, which refers to the genders (masculine, feminine, neuter), takes account of grammatical variations between some of the various languages which may be used as contract languages.

1.4 Law and Language

The law of the Contract is named in the Appendix to Tender.

Where versions of the Contract are prepared in different languages, the version which is in the ruling language named in the Appendix to Tender shall prevail. The language for day to day communications shall be as stated in the Appendix to Tender.

These details must be included in the Appendix to Tender. The law of the Contract may affect the interpretation of Part I, but should not cause ambiguity for any particular contract. It should be noted that, under some jurisdictions, certain provisions may be implied into the Contract. FIDIC acknowledges that some provisions in Part I may have different consequences in different legal jurisdictions.

1.5 Contract Agreement

Either party shall, if requested by the other party, execute a Contract Agreement, in the form annexed with such modifications as may be necessary to record the Contract. The costs of stamp duties and similar charges imposed by law shall be borne by the Employer.

A hasty award may give rise to problems (in the event of a future dispute) over the meaning and inter-relationship of communications exchanged between the respective submission dates of the Tender and Letter of Acceptance. Therefore, it is generally advisable to execute a Contract Agreement, in order to record what constitutes the Contract. In some countries, a Contract Agreement is an essential part of an enforceable contract. However, it was not thought appropriate to include an obligation in Part I.

Unless disallowed by law, the costs imposed by law on the execution of the Contract Agreement are borne by the Employer. The law may require each party to bear his own costs, with the possible exception of any expensive procedures which one party seeks to impose on the other. For example, it might be unreasonable for one party to require all the signatories to attend a joint signing ceremony.

The form for the Contract Agreement should be appended, in the tender document, to the contract Part II. An example form is included at the end of the Orange Book, and is reproduced at the end of this Guide. As mentioned in the published Part II, the parties may agree to include particular definitions: for example, the Contract Price and/or the dates defined in Sub-Clause 1.1.3.

In some countries, the method of execution of the Contract Agreement affects the duration of the parties' liabilities.

Under Sub-Clause 1.6, the Contract Agreement takes precedence over the terms of the Contract which became effective through the Letter of Acceptance.

1.6 Priority of Documents

The documents forming the Contract are to be taken as mutually explanatory of one another. If there is an ambiguity or discrepancy in the documents, the Employer's Representative shall issue any necessary clarification or instruction to the Contractor, and the priority of the documents shall be as follows:

- (a) *The Contract Agreement;*
- (b) *The Letter of Acceptance;*
- (c) *The Employer's Requirements;*
- (d) *The Tender;*
- (e) *The Conditions of Contract, Part II;*
- (f) *The Conditions of Contract, Part I;*
- (g) *The Schedules; and*
- (h) *The Contractor's Proposal.*

The order of precedence of the documents contained in the Contract can have a significant effect on a party's obligations in respect of any matter where he was not aware of an inconsistency when he entered into the Contract. This Sub-Clause provides for the possibility that discrepancies may be discovered between contract documents, with the result that some provisions may be invalidated by other provisions. Legal systems differ in the extent to which the Courts will seek to interpret a contract so as to avoid totally invalidating particular provisions.

Under the Orange Book, the Contractor is responsible for design and takes the financial risk arising from the lump-sum pricing; he may therefore have included many details in his tender Proposal. However, there is a possibility that (perhaps inadvertently) some parts of the Contractor's Proposal are inconsistent with some parts of the Employer's Requirements. In this event, this Sub-Clause resolves the problem in favour of the Employer, by making the Employer's Requirements take precedence over all documents other than those issued after receipt of the Tender.

If the Employer's Requirements contain an imprecise requirement, a tenderer may wish to avoid the problems which could arise due to possible differing interpretations of such a requirement. For example, the Employer's Requirements may specify that an item of Plant is to use "the most up-to-date technology", a very vague phrase. In this case, if the details in the Proposal and/or Schedule are sufficiently clear, there might be neither an ambiguity nor a discrepancy for resolution under this Sub-Clause, by reason of these details being knowingly agreed (by the Letter of Acceptance) as being the most up-to-date technology.

However, it is preferable to avoid this type of potential disagreement, by ensuring that the Contract does not contain imprecise requirements, and by ensuring that the Proposal contains sufficient information for the Employer to verify that the tenderer is offering to provide Works which will comply with the Employer's actual (if imprecise) requirements. See the above comments on Tendering Procedure (page 12).

If a problem arises from a discrepancy between two documents, there will usually be no change in the Contract Price, because Sub-Clause 1.6 prescribes how the discrepancy

is to be resolved. If there is an ambiguity or discrepancy within one of the contract documents, the Employer's Representative may wish to consult with the Contractor in an endeavour to reach agreement. If agreement is not achieved, the Employer's Representative is required to issue a clarification or instruction, with which the Contractor must comply: see Sub-Clause 3.4.

1.7 Documents on Site

The Contractor shall keep on the Site one complete set of the documents forming the Contract, the Construction Documents, Variations, other communications given or issued under Sub-Clause 1.8 and the documents mentioned in Sub-Clause 5.4. The Employer, the Employer's Representative and assistants (as referred to in Sub-Clause 3.3) shall have the right to use such documents at all reasonable times.

This administrative provision may be most applicable if the Employer's Representative does not have his own facilities on the Site.

1.8 Communications

Wherever provision is made for the giving or issue of any notice, instruction, consent, approval, certificate or determination by any person, unless otherwise specified such communication shall be in writing and shall not be unreasonably withheld or delayed.

Wherever provision is made for a communication to be "written" or "in writing", this means any hand-written, type-written or printed communication, including the agreed systems of electronic transmission stated in the Appendix to Tender.

All certificates, notices or written orders to be given to the Contractor by the Employer or the Employer's Representative, and all notices to be given to the Employer or to the Employer's Representative by the Contractor, shall either be delivered by hand against written acknowledgement of receipt, or be sent by airmail or one of the agreed systems of electronic transmission. The addresses for the receipt of such communications shall be as stated in the Appendix to Tender.

The first sentence requires formal communications to be in writing, and imposes the general obligation for promptness. Therefore, this obligation does not need to be repeated in the many relevant Sub-Clauses. In view of recent developments in electronic communications, and the possibility that one of the parties might not be equipped to receive certain types of such communications, the systems agreed by both parties are to be stated in the Appendix to Tender. A possible procedure would be for the Employer to name the systems which he is prepared to accept, and each tenderer could then delete the systems which he cannot utilise. The parties might need to consider how some of the available forms of communications can be authenticated, or their source verified.

1.9 Provision of Construction Documents

The Construction Documents shall be in the custody and care of the Contractor. Unless otherwise stated in the Employer's Requirements, the Contractor shall provide six copies for the use of the Employer's Representative and assistants (as referred to in Sub-Clause 3.3).

As producer of Construction Documents, the Contractor bears ultimate responsibility for their care, and should therefore ensure that back-up copies are safely stored. Sub-Clause 18.2 requires Construction Documents to be insured.

1.10 Employer's Use of Contractor's Documents

Copyright in the Construction Documents and other design documents made by or on behalf of the Contractor shall (as between the parties) remain the property of the Contractor. The Employer may, at his cost, copy, use and communicate any such documents (including making and using modifications) for the purposes of completing, operating, maintaining, altering, adjusting and repairing the Works. They shall not, without the Contractor's consent, be used, copied or communicated to a third party by the Employer or the Employer's Representative for other purposes.

Copyright is the intellectual property right of an originator to control the copying and use of his work. Generally, contracts which include the production of original designs should clarify the intellectual property rights (copyright) of the parties, including the extent of one party's entitlement to use the design produced by the other party as part of the contract.

Sub-Clauses 1.10 and 1.11 set out the FIDIC policy: designers should be able to retain the copyrights of their designs, and their clients should be able to use their designs for the original project and its expansion. The qualification "(as between the parties)" does not prejudice the intellectual property rights, in respect of their designs, of third parties such as Subcontractors.

Under Sub-Clause 1.1.6.1, Construction Documents include drawings, calculations, computer software (programs), samples, patterns, models, operation and maintenance manuals, and other manuals and information of a similar nature. When preparing the tender documents, the Employer may wish to consider the future uses of these documents. For example, certain projects may involve writing computer software which cannot be guaranteed free of errors; specific warranties and/or access to source code may be appropriate.

Under Sub-Clause 1.8, the Contractor gives consent in writing, which shall not be unreasonably withheld or delayed. It may be reasonable for the Contractor to withhold consent if the Employer declines to accept reasonable conditions in respect of secrecy and restrictions on use.

The Employer is entitled to use the Contractor's documents for the Works, but not for other purposes. Unless the Contractor consents, the Employer is not entitled to use the Contractor's documents for the provision of similar works, on the Site or elsewhere. In particular, if a further stage or expansion of the Works is executed, the Contractor's documents may be used as records of construction in order to determine the details of the existing facilities, but should not be used as working drawings for construction of identical facilities.

Modification of this wording, taking account of the Country's law, may be necessary if:

- (a) the Employer will require more use of the Construction Documents than as permitted in this Sub-Clause: he should then indemnify the Contractor from liability which might arise from inappropriate use (the design might be used for a purpose not envisaged by the designer);
- (b) the Construction Documents will include computer software (programs) which the Employer will use other than as permitted in this Sub-Clause; or
- (c) the Works will include process plant requiring some form of licence. See comments after Sub-Clause 5.9.

1.11 Contractor's Use of Employer's Documents

Copyright in the Employer's Requirements and other documents issued by the Employer or the Employer's Representative to the Contractor shall (as between the parties) remain the property of the Employer. The Contractor may, at his cost, copy, use and communicate any such documents for the purposes of the Contract. They shall not, without the Employer's consent, be used, copied or communicated to a third party by the Contractor, except as necessary for the purposes of the Contract.

Sub-Clause 1.11 mirrors 1.10: the Employer is given rights, in respect of the documents he provides to the Contractor, which are similar to those which the Contractor receives in respect of the documents he provides. The qualification "(as between the parties)" does not prejudice the intellectual property rights, in respect of their designs, of third parties such as the Employer's Representative. Under Sub-Clause 1.8, the Employer gives consent in writing, which shall not be unreasonably withheld or delayed.

1.12 Confidential Details

The Contractor shall not be required to disclose, to the Employer or the Employer's Representative, the confidential details listed in the Appendix to Tender.

Although the Employer might like to have all details of the Works/Plant which are going to be supplied to him, the Contractor and Subcontractors will wish to keep confidential certain processes which they regard as trade secrets. In order to reduce the likelihood of disagreement as to what is to be kept confidential, confidentiality is limited to the extent described (usually by the tenderer) in the Appendix to Tender.

1.13 Compliance with Statutes, Regulations and Laws

The Contractor shall, in all matters arising in the performance of the Contract, comply with, give all notices under, and pay all fees required by, the provisions of any national or state statute, ordinance or other law, or any regulation of any legally constituted public authority having jurisdiction over the Works. The Contractor shall obtain all permits, licences or approvals required for any part of the Works, in reasonable time taking account of the times for delivery of the Plant and Materials and for completion of the Works. The Employer and the Contractor shall comply with the laws of each country where activities are performed.

In order to facilitate the various administrative procedures imposed by the Country's law, the Employer may wish to complete any procedures which can be completed prior to the Contract becoming effective, and advise tenderers of the outcome. In particular, the Employer should apply for any essential licences which can be procured prior to inviting tenders: for example, planning consents and building permits. Tenderers may be reluctant to incur expense in the preparation of their tenders if they are uncertain whether statutory requirements can be satisfied, and there may also be time-related constraints. Part I makes no reference to these pre-contract procedures because they are pre-contract and because of the difficulty of referring precisely to Country-specific requirements.

Thereafter, this Sub-Clause makes the Contractor responsible for complying with the administrative procedures, many of which may require information which originates from the Contractor. He becomes responsible for ensuring that the Works conform with any statutory requirements (under Sub-Clauses 5.3 and 5.4), and that any statutory inspection requirements are satisfied. Sub-Clause 8.4 entitles the Contractor to extensions of time for unforeseeable delays caused by public authorities; their refusal of an essential licence could constitute force majeure under Clause 19.

If certain laws specifically relate to the Works, the Employer might wish to consider drawing them to the attention of tenderers, and/or dealing with their effects in the Contract. For example, major works may require legislation before they can legally be initiated, and/or may require various agreements with other affected parties. It is not envisaged that the Employer needs to list out all relevant legislation for the convenience of tenderers or the Contractor. If the Employer only lists some of the relevant legislation, the limited extent of the list should be stated, for avoidance of doubt.

When preparing the tender documents, the Employer may also need to consider what procedures are relevant to the continuing operation of the Works, since they may not be covered by this Sub-Clause. For example, the wording may need to be amended if the Works include process plant requiring some form of operational licence (see comments under Sub-Clause 5.9). However, provision of a process licence may be a requirement of any national or state statute, ordinance or other law, or any regulation of any legally constituted public authority having jurisdiction over the Works; if so, this Sub-Clause might be sufficient to impose an obligation on the Contractor to procure it, although possibly only for the Contract Period.

Although the law applicable to the Contract would require the parties to comply with it, the last sentence of Sub-Clause 1.13 also makes breach of a relevant foreign law a breach of Contract. The party in breach would then be unlikely to be able to be protected from any effects of the breach of the law, and might have to compensate the other party for these effects.

1.14 Joint and Several Liability

If the Contractor is a joint venture (or consortium) of two or more persons, all such persons shall be jointly and severally liable to the Employer for the fulfilment of the terms of the Contract. Such persons shall designate one of them to act as leader with authority to bind the joint venture (or consortium) and each of its members. The composition or the constitution of the joint venture (or consortium) shall not be altered without the prior consent of the Employer.

This Sub-Clause will only be effective if the Contractor is a joint venture or consortium, the precise definition of these terms being subject to the applicable law. When preparing the tender documents, the Employer may wish to assess his requirements, taking account of any information on the status of the prospective tenderers. They may prefer some other arrangement, namely the appointment of a delegated representative (an individual) to act as leader, rather than one of the members.

Sub-Clause 1.14 provides the minimum appropriate provisions, requiring each of the members to be fully liable and to appoint and empower a leader, and giving the Employer some protection from changes in the status of the joint venture or consortium. Under Sub-Clause 1.8, the Employer gives consent in writing, which shall not be unreasonably withheld or delayed.

Clause 2 The Employer

2.1 General Obligations

The Employer shall provide the Site and shall pay the Contractor in accordance with Clause 13.

This wording emphasises the two main obligations, although they are subsequently repeated. Obligations also arise under other Clauses of the Conditions of Contract.

2.2 Access to and Possession of the Site

The Employer shall grant the Contractor right of access to, and possession of, the Site within the time stated in the Appendix to Tender. Such right and possession may not be exclusive to the Contractor.