

Polish Road Congress International Conference 2013

*“The Added Value of Fair Contract Conditions
and International Best Practice”*

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Agenda

- **About EIC & Our experience on FIDIC standard contract forms**
- **Added Value of Fair Contract Conditions**
- **Situation in Poland** (*as established by FIEC and EIC*)
- **International Benchmark** (*for Construction Crisis Management*)
- **Conclusions**

About EIC: Organisation

- ✦ **Founded in 1970**, registered as **independent association since 1984**
- ✦ **Close co-operation** with the European Construction Industry Federation **FIEC**
- ✦ Members are ***construction trade federations from 15 European countries*** which represent more than ***200 internationally active companies***
- ✦ Board consists of ***14 senior company executives*** (from 14 countries)
- ✦ **EIC Positions** are elaborated by **Working Groups** composed of **company experts**: ***“Contract Conditions”***, ***“Africa”***, ***“World Bank Procurement”***
- ✦ EIC is a ***“friendly reviewer”*** of the **FIDIC standard forms of contract**
- ✦ EIC has **officially endorsed CoST**
(Construction Sector Transparency Initiative)



About EIC: Tasks & Objectives

● Creating Business Opportunities

- No **Budget Aid** (Maintain the project approach for infrastructure)
- **Innovative financing Instruments** (EU Infrastructure Blending Facility for Africa)
- Promotion of **PPP approach** in emerging markets

● Enabling Networking & Services

- **Conferences & Workshops**
- **Newsletter**
- **Publications & Statistics**

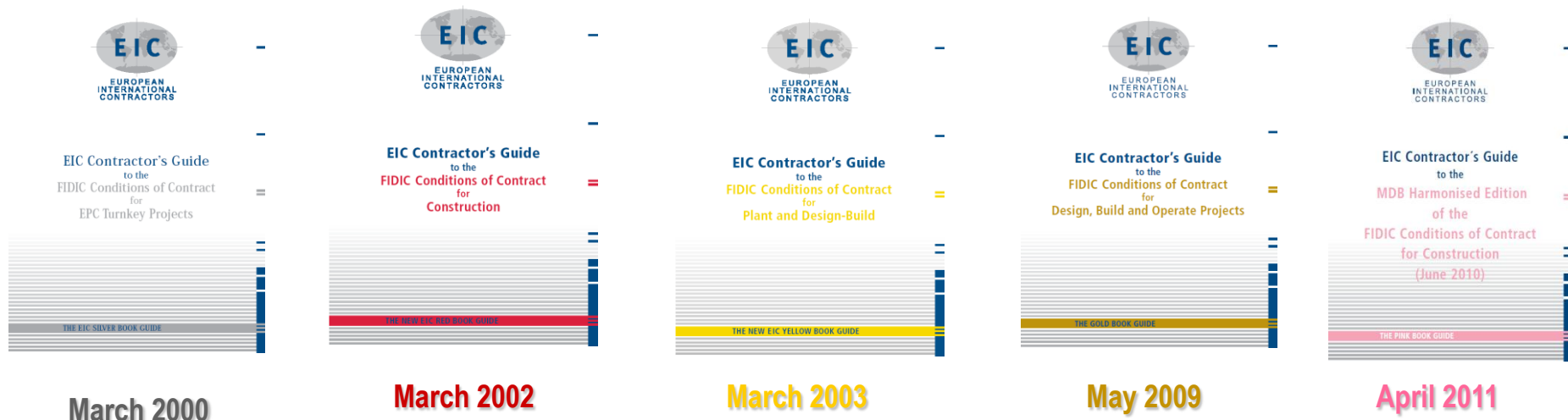
● Promoting Good Practices

- **Quality-Based Competition** (“MEAT”) instead of lowest price
- **Real Competition** (No unfair competition from subsidised state-owned entities)
- Use Country Systems only when equivalent to **international procurement (World Bank) standards**
- **Balanced Contract Conditions** (incl. *Particular Conditions*)
- **Effective Dispute Settlement**
- **Corruption-free environment (CoST)**

About EIC: Contractor's Guides









International Construction Law Review, October 2011 (Introduction)

*They [the EIC Contractor's Guides] are valuable as they are the **product of a responsible and reputable international organisation**. They also throw a light on the approaches to be adopted in drafting international construction contracts... As in the past, **EIC's comments are balanced**. They indicate what it regards as **improvements** and what it believes to be **retrogressions**.*



Added Value of Fair Contract Conditions

Fair Standard Forms of Contract in the EU

COUNTRY	FORM	YEAR
AT 	ÖNORM B2110	2009
DE 	VOB/B	2012
DK 	AB 92 und ABT 93	1992 / 1993
FR 	CCAG	2009
GB 	ICC and NEC	2011 / 2010
IT 	DPR 207/2010	2010
NL 	UAV	2012
PL 	<i>„Bastardised“</i> FIDIC <i>„Red & Yellow Books“</i>	1999

Added Value of Fair Contract Conditions

- **Allocate the risk fairly**, i.e. to the party which can best control or manage the risk, or if neither party control/manage, then to the Employer as beneficiary of the project
- **Provide the lowest outturn cost**, as bidders **do not have to price for potential risks**
- **Avoid any possibility of arbitrary interpretations and actions** by one of the parties

IMPACT OF <u>FAIR</u> CONDITIONS	IMPACT OF <u>UNFAIR</u> CONDITIONS
Lower tender prices	Higher tender prices
Co-operation / Teamwork	Claims, Disputes, Penalties
Profitability	Insolvencies / Bankruptcies
Professionalism & Integrity	Corruption / Cartels

Added Value of Fair Contract Conditions

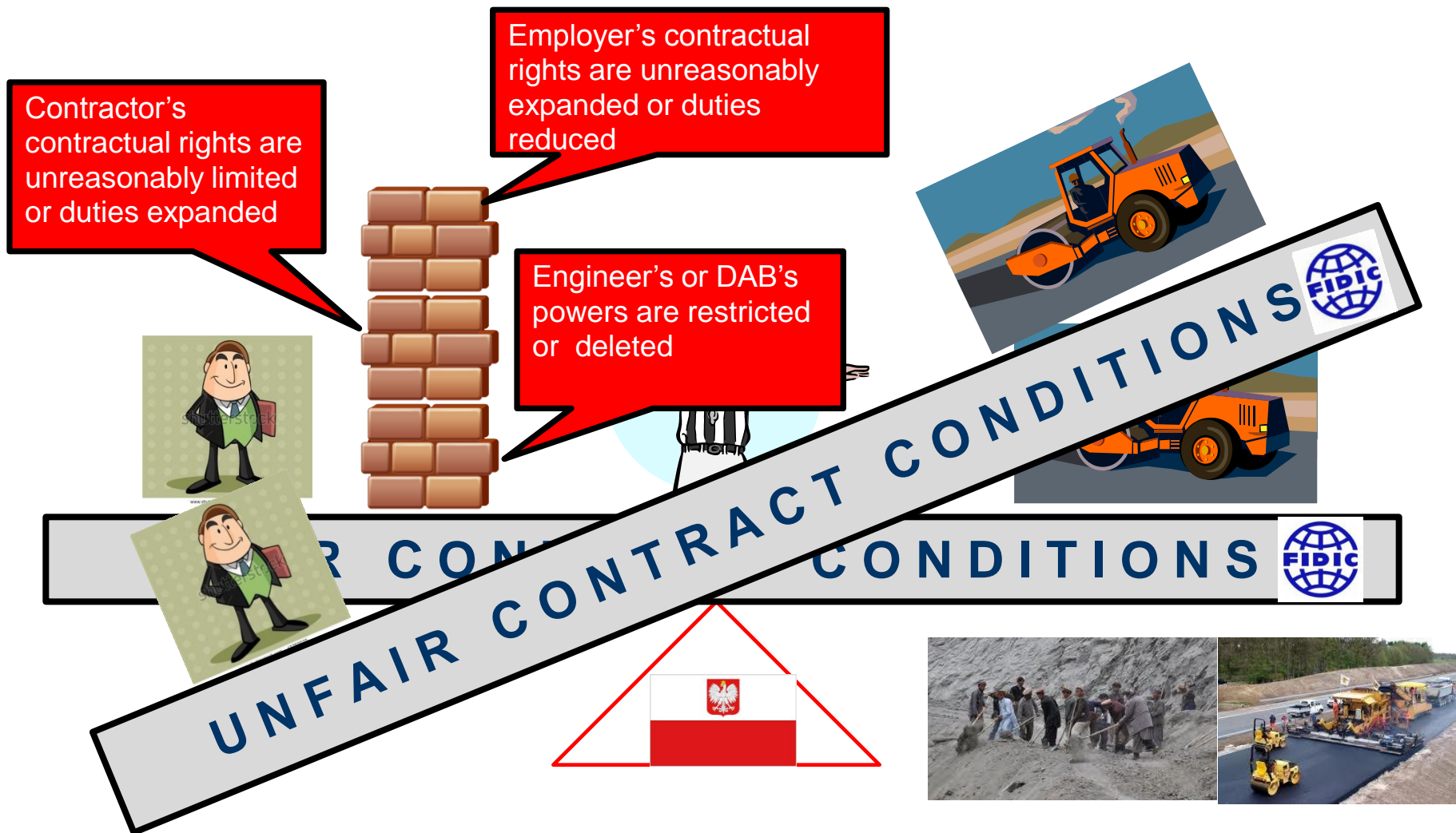
“JICA Checklist for One-Sided Contracts” (March 2011)

If risks to the Contractor become **excessively high**, the following **problems** may occur:

- ✦ Higher bid price
- ✦ Bid failure & disruption of project implementation
- ✦ Contract award to **bidder who fails** or was not capable of estimating the risks properly
- ✦ **Poor construction quality** and **delay of the work**
- ✦ **Undermining** the relationship of **mutual trust and respect** between parties
- ✦ **Groundless claims** from the contractor
- ✦ **Frequent disputes** between the employer and the contractor
- ✦ In extreme cases **eventual termination** of the contract



Added Value of Fair Contract Conditions




Added Value of Fair Contract Conditions

Causes leading to Unfair Contracts Conditions (JICA)

- ✦ Employer's lack of a sufficient budget for the works
- ✦ Employer's lack of understanding about the importance of fair contract conditions
- ✦ Employer's lack of time and budget for creating adequate contract documents (specifications, drawings, permissions, contract conditions, etc.)
- ✦ Employer's obligation to observe domestic laws and regulation
- ✦ *Any other motives ???*

Situation in Poland

Typical examples for limiting Contractor's rights

Event	Time	Cost	Cost plus Profit
Delayed Drawings or Instructions	X		
Right of Access to the Site	X		
Fossils	X		
Setting Out, Ground conditions	X		
Exceptionally adverse climatic conditions			
Consequences of Suspension by Employer	X		
Adjustment for Changes in Legislation	X		
Consequences of Employer's Risks	X		



Situation in Poland

Typical examples for expanding Contractor's duties

- ✦ **Cap for Liquidated Damages is deleted**
- ✦ **Liquidated Damages are not dependent on Contractor's default**, e.g. Contractor is held responsible for exceptionally adverse whether conditions or acts of third parties
- ✦ **Liquidated Damages** also apply in cases which have **no relevance for the fulfilment of the contract**, e.g. when the breach of contract has no final impact on the timeliness or the quality of the completed works
- ✦ Contractor has to give **notice of a claim** within **14** or even **7 days**

Situation in Poland

Typical examples for reducing Employer's duties or increasing Employer's rights

- ✦ Employer **deletes** provisions concerning his **obligations to co-operate, e.g. obtaining permits, licenses and approvals** necessary for the performance of the works
- ✦ Employer **acquits itself** from any responsibility regarding the **correctness and completeness of design documents**
- ✦ Employer is entitled to **terminate the contract** in case of ***“reasonable grounds to believe that the Contractor is not able to carry out the works within the time contractually agreed”*** or if the Contractor ***“subcontracts any part of the works without the Employer's consent”***

Situation in Poland

Restriction of Engineer's or DAB's powers

- ✦ Employer **requires the Engineer to obtain his prior consent before making a determination** without specifying the procedure for obtaining such consent
- ✦ Engineer has a right to make a **determination without prior consultation** of the parties, i.e. the Contractor
- ✦ **DABs are usually deleted** from the contract
- ✦ All disputes need to go to court!

Situation in Poland

plus: Primacy of Polish law

- **Payment to subcontractors**
- **Defects Notification Period – Warranty (*rękojmia*)**
- **Termination – Withdrawal (*odstąpienie*)**

International Benchmark

Latham Report “*Constructing the Team*”



- ✦ A **specific duty for all parties to deal fairly** with each other, and with their subcontractors and suppliers, in an **atmosphere of mutual co-operation**
- ✦ A choice of **allocation of risks**, to be decided as appropriate to each project but then allocated to the **party best able to manage, estimate and carry the risk**
- ✦ Taking all reasonable steps to **avoid changes** to pre-planned works information; but, where **variations** do occur, they should be **priced in advance**, with provisions for **independent adjudication** if agreement cannot be reached
- ✦ While taking all possible steps to avoid conflict on site, providing for **speedy dispute resolution** if any conflict arises, by a **pre-determined impartial** adjudicator or expert
- ✦ Providing **incentives for exceptional performance**

International Benchmark



Taken from Constructing Excellence's *Survival Guide* –
Working out of an industry downturn (Sept 2009)

International Benchmark

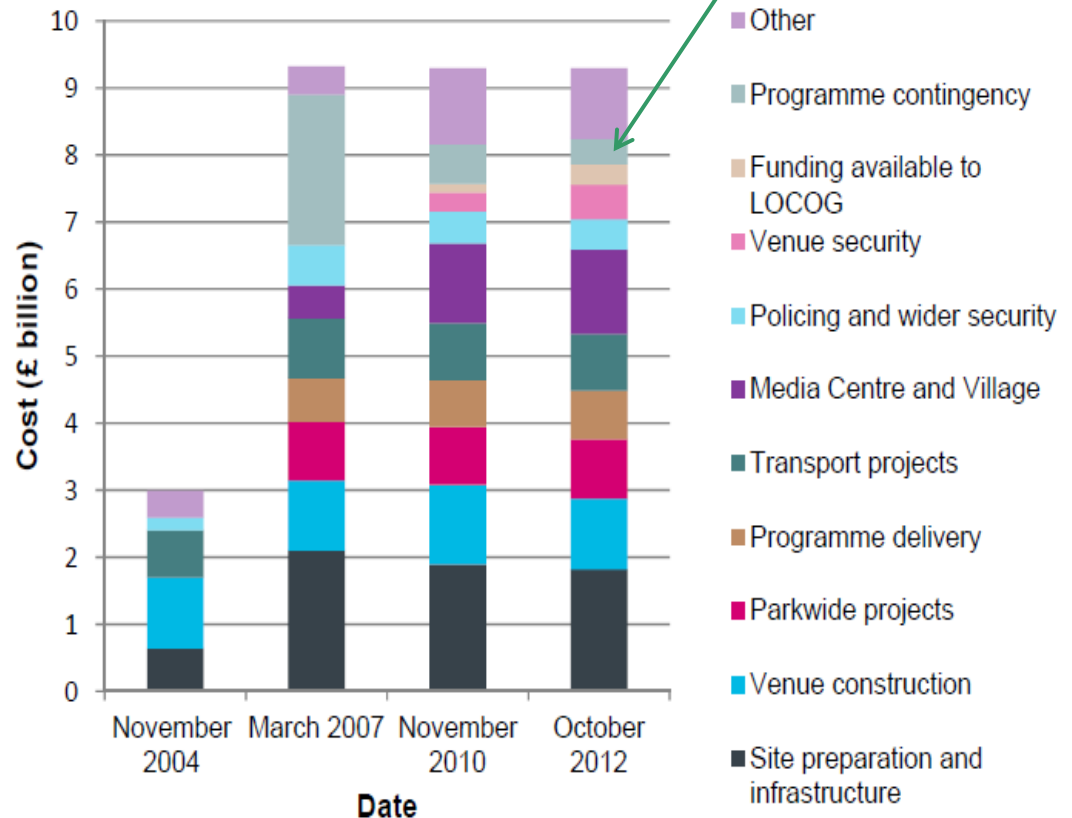
Delivery of London Olympic Games 2012

377 mil. £ handed back to Treasury

Figure 5: London 2012 public sector funding package over time

The Challenge – Complexity

- 1 Programme
- 19 Major Projects
- 120 NEC3 Contracts (+ 1 Development Agreement, 184 JCT and 3 concessions)
- 96 Tier 1 suppliers
- 869 Critical Tier 2 & 3 suppliers (Insolvency Risk)
- 4,400 Unique Design Interfaces
- 27,000 Integrated Plan Activities
- 1,520 Linked Activities
- 10,490 Site Workers (Daily Average)
- 529 Daily vehicle movements (materials)
- 2 Site entry points (plus rail head)
- 7,300 (£m) Budget (average burn rate of £150m/month, peak £190m)
- 1 Key date - 27 July 2011



Conclusion

If you always do...

What you always did,...

You will always get...

What you always got!

Sir Michael Latham (author of “Constructing the Team” 1984)

“Never waste a good crisis”

Andrew Wolstenhome (author of the Construction Excellence Report 2009)

Conclusion

Messages from the FIEC/EIC Working Group “Poland”

- ✦ The **spirit of the FIDIC “Red & Yellow Books”** needs to be respected: **Particular Conditions** must be limited to **project- and country-specific issues** and may **not be misused for the reallocation of risks**
- ✦ The **Engineer’s authority** needs to be restored
- ✦ A **quick solution** should be found to the **pending claims** (ca. 10 bn. PLZ)
- ✦ Contractors should not be obliged to take responsibility for **design errors or faulty information provided by the Employer**
- ✦ **Tenders** should not be **awarded** to the “biggest gambler” but to the most professional bidder presenting the **Economically Most Advantageous Tender**
- ✦ **Employers** should **review** their **penalty policy**, including the respective **amendment to the Public Procurement Law**

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