

any claim by the CONTRACTOR for additional compensation and/or time to complete the work if such instructions (are in his opinion) above and beyond the requirements of the Contract."

148. Clause 49.4 of FIDIC-EMW, which deals with a relationship between the obligation to perform in case of arbitration and suspension of contract, reads:

"Performance of the Contract shall continue during Arbitration proceedings unless the Employer shall order the suspension thereof, and if any such suspension shall be ordered the reasonable expenses of the Contractor occasioned by such suspension shall be included in the Contract Price if the Arbitrators so decide. No payments due or payable by the Employer shall be withheld on account of pending reference to Arbitration."

149. It seems to follow from this provision that the obligation to proceed with the performance of the contract (by the contractor) does not apply if the purchaser suspends the performance of the contract irrespective of whether or not he was entitled to do so.

Part Three

[A/CN.9/WG.V/WP.7/Add.6*]

LIST OF QUESTIONS FOR CONSIDERATION BY THE WORKING GROUP

A. Introduction

The Working Group may wish to consider the questions listed below in its discussion of the topics in the light of Study II. As in Study I, the list is not intended to be exhaustive.

B. Questions

I. Feasibility studies

1. Should the contractor be obliged to verify the accuracy and adequacy of

(a) Feasibility studies, or

(b) Information on which these studies are based supplied to him by the purchaser? (See also question 55).

2. If question 1 is answered in the affirmative, should this obligation be limited to the discovery of evident errors or defects, or should it be wider?

3. If question 1 is answered in the affirmative, should this obligation be limited to feasibility studies and information which are to be used as a basis for the work to be performed by the contractor?

4. Should the contractor be obliged, independently of studies or information supplied by the purchaser, to make studies and obtain information necessary for him to carry out his obligations under the contract?

5. If question 1 or 4 is answered in the affirmative, how should the legal implications arising from a discrepancy between verification, studies made and information obtained by the contractor, and studies and information supplied by the purchaser, be settled?

6. When physical conditions are dealt with in feasibility studies, to what extent should the contractor be responsible for his performance under the contract when a change of physical conditions affects such performance?

7. If the contractor is to bear some responsibility in respect of feasibility studies or information supplied to him by the purchaser who had obtained them from a third party, should the purchaser be obliged to assign to the contractor his rights arising from a breach of obligation by the third party in preparing such study or obtaining such information?

II. Formation of contract

(Questions on the legal issues involved in tender procedure have not been formulated for the reasons indicated in A/CN.9/WG.V/WP.7/Add.1, paragraph 22**.)

8. Should the legal guide analyse legal problems connected with contractual terms which under the works contract are to be agreed upon in the future by the parties?

9. Should the legal guide analyse legal problems connected with contracts subject to condition (e.g. entry into force subject to condition)?

III. Variation

10. Should the purchaser be entitled unilaterally to vary the scope of the work undertaken by the contractor, if so, under what circumstances, and to what extent?

11. Should the contractor be entitled unilaterally to vary the scope of the work undertaken by him, and if so, under what circumstances, and to what extent?

12. If question 10 or 11 is answered in the affirmative, by what procedure should the scope of consequent variations in other contractual provisions (e.g. price, time schedule, performance guarantees) be determined?

IV. Interpretation

13. Should the contract include a provision on general rules of interpretation? If so, what principles should be reflected in these rules?

14. To what extent should the negotiations be taken into consideration in interpreting a contract (e.g. views

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exchanged, statements made, or conduct during negotiations)?

15. Should the legal guide recommend definitions of certain terms often used in works contracts? Which terms should be defined?

16. Should the legal guide recommend rules to resolve conflicts between the contract, annexures thereto, and general conditions incorporated by reference?

V. *Assignment*

17. Should either party be allowed to assign the contract as a whole, and if so, under what conditions?

18. Should either party be allowed to assign his rights under the contract, and if so, to what extent?

19. Should either party be allowed to assign his obligations under the contract, and if so, to what extent?

VI. *Sub-contracting*

20. Should the ability of the contractor to sub-contract be restricted, and if so, to what extent?

21. When sub-contracting is permitted, to what extent should the purchaser participate in the selection of a sub-contractor by the contractor? (See also question 35).

22. To what extent should the terms of the sub-contract be determined in the main contract?

23. If the contractor is obliged to procure equipment or services for the purchaser, should he be obliged

(a) To conclude contracts with a third party in his own name on account of the purchaser; or

(b) To conclude contracts with a third party on behalf of the purchaser; or

(c) To assist the purchaser in his negotiations with a third party? (See also question 36).

24. Should the purchaser be entitled to pay the sub-contractor if the contractor fails to pay him, and if so, under what conditions?

25. Should the legal guide deal with contracts entered into by the purchaser with third parties in connection with the execution of the works?

26. If question 25 is answered in the affirmative, should the sub-contractors to be employed by the purchaser be agreed upon between the contractor and the purchaser, and if so, in which cases?

27. Should the legal guide deal with the consequences of failure of performance by the purchaser's suppliers affecting the execution of the contract by the contractor?

VII. *Co-ordination and liaison agents*

28. Should a liaison agent be designated by each party in the contract, and if so, should the scope of the agent's

authority be determined in the contract by the party designating him?

29. Should the contract include a provision on the duty of the parties to co-operate in the execution of the contract, and if so, how should this duty be defined?

30. What co-ordination procedure should be agreed upon in the contract?

VIII. *Engineer*

31. What should be the main functions and scope of authority of the engineer as the purchaser's representative?

32. In addition to his functions as the purchaser's representative, should the engineer be given the function of deciding certain issues affecting the parties as an impartial person? (See also questions 92 and 93).

33. If the answer to question 32 is in the affirmative, how should his duty to be impartial be defined?

IX. *Liabilities in respect of third parties*

34. In what cases, if any, should the contractor be fully responsible for failure to perform by a third party (e.g. employee, sub-contractor) whom the contractor has engaged for the fulfilment of his obligations under the contract and in what cases, if any, should the contractor's responsibility be limited?

35. Should the responsibility of the contractor for sub-contractors employed by him differ, depending on whether they have been chosen solely by the contractor, or on whether the purchaser has participated in their selection?

36. What should be the responsibility of the contractor

(a) If he concludes contracts as described in question 23 (a)?

(b) If he concludes contracts as described in question 23 (b)?

(c) If he assists in negotiations as described in question 23 (c)?

37. Should the legal guide deal with loss or damage caused to the purchaser in connection with the execution of the contract by employees or sub-contractors of the contractor, or loss or damage caused to the contractor in connection with the execution of the contract by employees or sub-contractors of the purchaser?

X. *Technical assistance*

38. What issues should be addressed in connection with the provision of training (e.g. place of training, payment conditions, type of training)?

39. What issues should be addressed in connection with the provision of management services (e.g. payment conditions, type of management, responsibility for operation of the works)?

40. What kinds of technical assistance other than the provision of training and management services should be dealt with in the legal guide?

41. If technical assistance other than training and management services are to be dealt with, what issues should be addressed in connection therewith?

42. Are there any special problems (other than those involved in the transfer of technology) in protecting confidential information conveyed through technical assistance? If so, how should such problems be solved?

XI. *Maintenance and spare parts*

43. Should the legal guide deal with the contractor's obligation to maintain the works?

44. If question 43 is answered in the affirmative, what should be the scope of the main obligations of the contractor in regard to the maintenance of the works after the expiry of the guarantee period?

45. What should be the obligations of the contractor in regard to the supply of spare parts manufactured by him? (See also question 8.)

46. Should the contractor be obliged to procure spare parts manufactured by third parties? (See also question 23.)

47. If question 46 is answered in the affirmative, what should be the extent of his obligation in connection with such procurement? (See also questions 23 and 26.)

XII. *Storage on site*

48. To what extent should either of the parties be obliged to provide storage facilities and to store materials and equipment on site?

49. Who should bear the costs connected with such provision of storage facilities and storing?

50. Who should bear the risks in respect of materials and equipment stored on site, and to what extent?

XIII. *Price*

51. What factors favour the adoption of

- (a) A lump-sum price, or
- (b) A price on the basis of time incurred and work done, or
- (c) A reimbursable price for a works contract, or certain items herein?

52. If the price is to be determined on the basis of time incurred and work done, what procedures are appropriate for measuring the time incurred and work done?

53. In the case of a reimbursable price, what procedures are appropriate for determining the price payable?

54. Should the legal guide deal with issues concerning price currency, and if so, which issues?

XIV. *Revision of price*

55. Should the contractor be entitled to an increase in price if the scope of the work has to be changed owing to the discovery of errors in the data supplied by the purchaser?

56. Should there be a revision of the price when a change in the laws in force on the site requires an alteration of the works? (See also question 12.)

XV. *Payment conditions*

57. How should the due date of an advance payment be determined?

58. What conditions should be required for payments to be made during the course of the execution of the contract?

59. What conditions should be required for payments to be made after completion of the works?

60. What conditions should be required for payments to be made after the expiration of the guarantee period?

61. Should the legal guide deal with issues relating to bonus stipulated for completion of the work by the contractor before the due date?

62. When the contractor has granted credit to the purchaser, should issues relating to the credit terms be analysed?

XVI. *Performance guarantees*

63. What should be the legal nature of the performance guarantee (e.g. independent, accessory, subsidiary)?

64. At what time should the performance guarantee be provided?

65. Should the contract provide for a reduction in the amount of the performance guarantee? If so, under what circumstances and to what extent should the amount of the guarantee be reduced?

66. When the performance guarantee is subsidiary, what steps should the purchaser take before he is entitled to claim under the guarantee?

67. Should the guarantor's obligations be limited to the payment of a sum of money, or might it also include other obligations?

68. What should be the effect upon the performance guarantee of variation of the contract?

69. Should the legal guide deal with the period to be covered by a performance guarantee?

XVII. *Insurance*

70. What risks should be covered by insurance of the materials and equipment to be incorporated in the works, and who should provide such insurance?

71. What period of time should be covered by the insurance mentioned in the previous question?

72. Should insurance of the materials and equipment cover the time during which the contractor bears the risks in respect of such materials and equipment?

73. What risks should be covered by insurance of the works during the construction, and who should provide such insurance?

74. Should the contractor's equipment be covered by insurance?

75. Should the legal guide deal with liability insurance of the purchaser and contractor?

76. What should be the consequences of failure to provide insurance in accordance with the contract?

XVIII. *Customs duties and taxes*

77. Should the legal guide deal with issues relating to customs duties?

78. Should the legal guide deal with issues relating to taxes and levies?

XIX. *Bankruptcy*

79. Should the bankruptcy of either party be dealt with only in chapters dealing with other topics when bankruptcy is relevant to such topics?

80. What should be the rights under a works contract of the purchaser on the bankruptcy of the contractor, and vice versa?

XX. *Notices*

81. In what contexts in works contracts should the despatch theory under article 27 of the Sales Convention be adopted?

82. In what circumstances should notice constitute a pre-requisite to the exercise of a right?

83. Should a failure to notify within a time-limit result in the loss of a right, and if so, in what circumstances?

84. In what situations, if any, should a presumption of approval or consent be raised upon failure to respond to a notice within a time-limit?

85. What consequences should the failure to notify have in cases not covered by questions 82 and 83 above?

XXI. *Settlement of disputes*

86. Should the parties be obliged to attempt to settle their disputes by negotiation before instituting legal proceedings?

87. If question 86 is answered in the affirmative, what procedure should be provided for such negotiation?

88. For the settlement of disputes concerning technical issues, should the parties be obliged to refer such disputes to a technical expert for his opinion prior to instituting legal proceedings?

89. Should the legal guide deal with conciliation as a means of dispute settlement?

90. In relation to the use of arbitration as a means of dispute settlement, should the legal guide only recommend the use of the UNCITRAL Arbitration Rules, or in addition analyse the special problems connected with the use of arbitration in works contracts?

91. Should the legal guide deal with clauses on court jurisdiction?

92. Should the engineer be authorized to settle disputes between the contractor and the purchaser and, if so, should such an authorization be limited to technical issues?

93. If question 92 is answered in the affirmative, what should be the legal nature of the engineer's decision given in the settlement of a dispute?