

 [www.fidic.org](http://www.fidic.org)

# FIDIC-SIDiR-EFCA Regional Infrastructure Conference

**Krakow**  
**7 & 8 March 2016**

 International Federation of Consulting Engineers



[www.fidic.org](http://www.fidic.org)

## FIDIC-SIDiR-EFCA Regional Infrastructure Conference

# Conditions of contract which help in implementation of European public investments

**Dr. Rafal Morek**  
adwokat, partner  
K&L Gates LLP  
[rafal.morek@klgates.com](mailto:rafal.morek@klgates.com)

 International Federation of Consulting Engineers


Krakow, 7 & 8 March 2016




www.fidic.org **FIDIC-SIDiR-EFCA Regional Infrastructure Conference**

**Agenda:**

- 1. Conditions of contract used in public investments:  
Current state of play**
- 2. Attributes of a well designed  
public investments construction contract**
- 3. New legal framework for implementation of  
European public investments**


 International Federation of Consulting Engineers


Krakow, 7 & 8 March 2016




www.fidic.org **FIDIC-SIDiR-EFCA Regional Infrastructure Conference**

**Conditions of contract  
used in public investments:  
Current state of play**



 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



www.fidic.org FIDIC-SIDIR-EFCA Regional Infrastructure Conference

## Current state of play

- The construction industry has been globalizing with the globalization of the whole world; clashes of business and legal cultures unavoidable
- Contractual practices in European public investments are highly diversified accross the EU
- The construction contract "designed to make all participants *speak the same language*"
  - Shuibo Zhang, Introductory Remarks [in:] L. Klee, International Construction Contract Law
- "The Use and Misuse of FIDIC Forms"\* in many Member States, including the CEE
 

\*Title of the article of L. Klee, A. Marzec, M. Skorupski, Int'l Construction Law Review 2014

Krakow, 7 & 8 March 2016





 International Federation of Consulting Engineers




www.fidic.org FIDIC-SIDIR-EFCA Regional Infrastructure Conference


## Construction Contracts currently used in public investments in CEE

- Several principles of the FIDIC Silver Book *de facto* adopted by public Employers in construction contracts:
  - transfer of majority of risks onto the Contractor;
  - reduction of the Engineer's position;
  - restrained / no right to raise claims for add. time or money;
  - cap on adjustments to contractual remuneration.

Krakow, 7 & 8 March 2016

 International Federation of Consulting Engineers



## Allocation of risks. Limitation of Employer's liability

- Routine to shift the balance of risks towards the Contractor and to limit the Employer's liability in most CEE countries, incl. notably Poland, Romania and many others;
- Changes frequently concern:
  - errors in Setting Out data (sub-clause 4.7),
  - inaccurate or incomplete Site Data (sub-clause 4.10),
  - unforeseeable physical conditions (sub-clause 4.12),
  - errors in the Employer's Requirements (sub-clause 5.1).
- Contractors must handle virtually all "known unknowns" and "unknown unknowns"



International Federation of Consulting Engineers

Krakow, 7 &amp; 8 March 2016



## Restriction of grounds to raise the Contractor's claims

- Even the risks traditionally borne by the Employer such as
  - the risk of legislative changes,
  - lack of possession or access to site due to lengthy administrative proceedings etc.
 are being transferred onto the Contractor, limiting his right to raise claims for extension of time and adjustment of remuneration.
- Asymmetry: the Employer's interests protected (?) by heavy contractual penalties + no / high liability caps



International Federation of Consulting Engineers

Krakow, 7 &amp; 8 March 2016



## Reduction of the Engineer's position

- Tendency to limit the Engineer's freedom and acting capacity, and to adopt the Silver Book model of "Engineer as the Employer's agent"
- Fixed price lump sum solutions
  - Other procurement models rarely explored
  - For example, "target cost" contracts where the contractor is paid on a cost reimbursable basis and the contractor and the employer share the risk of cost overrun ("pain") and underrun ("gain")



International Federation of Consulting Engineers

Krakow, 7 &amp; 8 March 2016



## What were the results?

- The award of the contract to a bidder who fails or is incapable of estimating the risks properly;
- Bid failure and disruption of project implementation;
- No mutual trust and respect between the parties; poor quality; termination of the contracts;
- Poland: only in 2013 benefitted with EUR **16.2 billion** from the EU budget; despite this, a wave of **company bankruptcies** on the infrastructural market



## Lessons to be learnt!



International Federation of Consulting Engineers

Krakow, 7 &amp; 8 March 2016



www.fidic.org FIDIC-SIDiR-EFCA Regional Infrastructure Conference




**Contracts awarded  
on the basis of a public tender  
should have (all?) the attributes of  
a "good" construction contract**

 International Federation of Consulting Engineers 

www.fidic.org FIDIC-SIDiR-EFCA Regional Infrastructure Conference

**Role of "Golden Principles" embedded in the FIDIC Forms  
in implementation of European public investments**

- Clauses immutable, i.e. once altered/deleted, the contract should never been referred as a "FIDIC Contract"
- FIDIC's control on the use of its standardised contract forms?
- FIDIC providing a new generation of services (authentication?), through which it would become possible to avoid misuse of FIDIC Conditions of Contracts?

 International Federation of Consulting Engineers  Krakow, 7 & 8 March 2016


www.fidic.org FIDIC-SIDiR-EFCA Regional Infrastructure Conference

**Basic attributes of a well-designed [public investment] construction contract:**

- an integrated, well-considered whole, best suited to deliver the project in the way the parties intended;
- fairly allocates risks to the party who is best positioned to anticipate and control the risks; is well balanced;
- anticipates a wide variety of potential problems;
- written in a clear, concise and unambiguous language;
- clearly defines the scope of works;
- has a sound dispute resolution mechanism;
- **BUT... limited admissibility of post-tender changes.**

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016




www.fidic.org FIDIC-SIDiR-EFCA Regional Infrastructure Conference

**PUBLIC INVESTMENT CONTRACTS**


Public Procurement Laws  
Public Finance  
Illegal State Aid

Anti-Corruption  
Other Regulations and Practices

**RESTRAINED FLEXIBILITY/AUTONOMY OF THE PARTIES**

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016





## Public investment v. flexibility?

- Employers and contractors regularly wish / need to modify existing contracts awarded on the basis of a public tender.
  - A dilemma arises whether:
    - **A new tender** procedure connected to the performance of an already running project is required, or
    - **A modification of the existing contract** is permissible?
- ➔ **Limited use of Clause 13 [Variations] (if any)**
- “From a socio-economic perspective, it is hardly desirable if the employer (for fear of breaching procurement rules) continues to perform a project that does not completely fulfil their requirements.”

HARTLEV & LILJENBØL, Changes to existing contracts under the EU public procurement rules and the drafting of review clauses to avoid the need for a new tender, Public Procurement Law Review 2(2013), Sweet&Maxwell



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



## New legal framework for implementation of European public investments



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016






[www.fidic.org](http://www.fidic.org)**FIDIC-SIDiR-EFCA Regional Infrastructure Conference**


**Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement**

*Article 90*

**Transposition and transitional provisions**

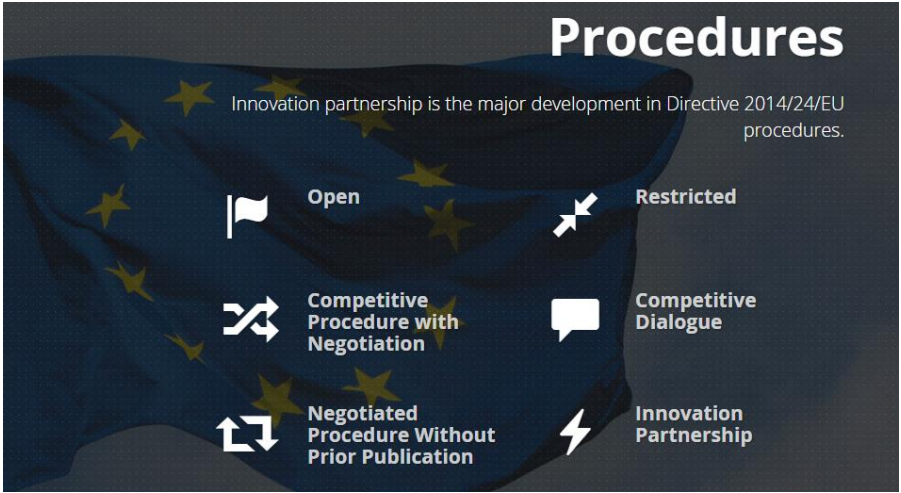
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. They shall forthwith communicate to the Commission the text of those measures.

 International Federation of Consulting Engineers







**Krakow, 7 & 8 March 2016**


[www.fidic.org](http://www.fidic.org)**FIDIC-SIDiR-EFCA Regional Infrastructure Conference**


**Directive 2014/24/EU**

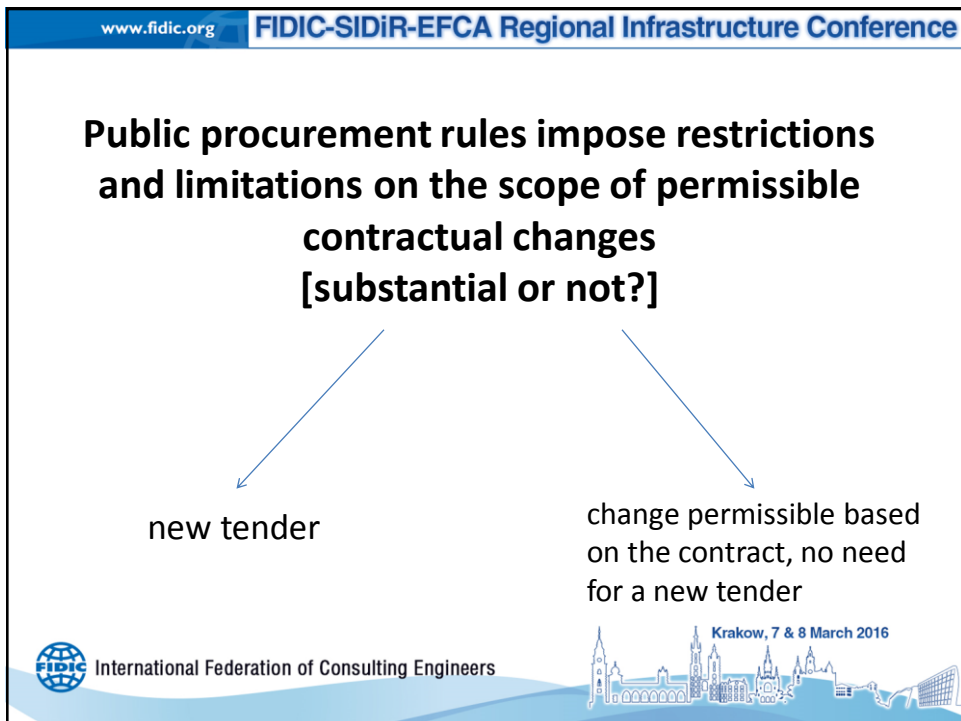
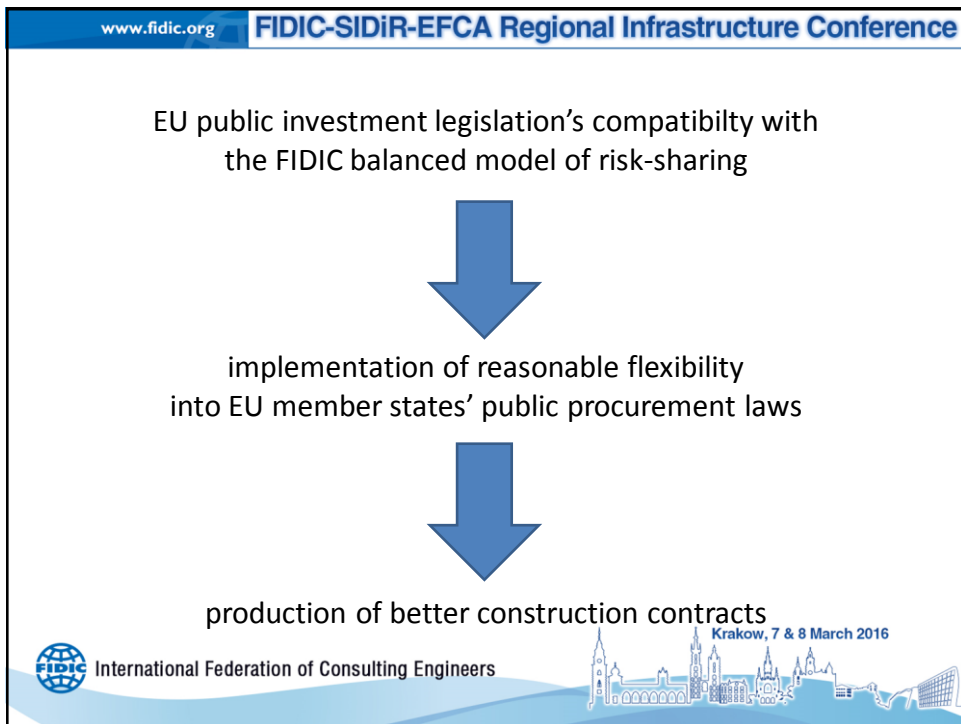
**Procedures**

Innovation partnership is the major development in Directive 2014/24/EU procedures.

 <b>Open</b>	 <b>Restricted</b>
 <b>Competitive Procedure with Negotiation</b>	 <b>Competitive Dialogue</b>
 <b>Negotiated Procedure Without Prior Publication</b>	 <b>Innovation Partnership</b>

 International Federation of Consulting Engineers


**Krakow, 7 & 8 March 2016**





www.fidic.org FIDIC-SIDiR-EFCA Regional Infrastructure Conference

## Variations and EU procurement law

Equal treatment of tenderers  
Transparency



limitations imposed on amendments to public contracts  
– **variations not permissible when they substantially affect the subject-matter of the contract**

 International Federation of Consulting Engineers  Krakow, 7 & 8 March 2016

www.fidic.org FIDIC-SIDiR-EFCA Regional Infrastructure Conference

## Directives EU 2014/24 and /25



### Business-oriented test of substantial amendment to contract

**Art. 4 of Directive EU 2014/24**

- Amendment will be deemed substantive if the budgetary threshold of EUR 5 186 000 (net of VAT) is exceeded

**Art. 72 of Directive EU 2014/24**

- Limits to modifications to contracts during their term;
- Art. 72.2. (a)-(e) - circumstances which preclude the need to retender;
- Art. 72.2. (i) and (ii) – notwithstanding (a)-(e) → when value of change is below the one referred to in art. 4 and falls below the value of 10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts.

 International Federation of Consulting Engineers  Krakow, 7 & 8 March 2016

## Directives EU 2014/24 and /25

Confirm the circumstances in which contracts may be varied without necessitating a new procurement process:

- Low value/below threshold changes;
- Changes (regardless of their monetary value) that have already been provided for in the initial procurement documents in "clear, precise and unequivocal" review clauses; provided that
  - (i) the clauses state the scope/nature of the possible changes and the conditions under which they may be used, and
  - (ii) the changes do not alter the overall nature of the contract;
- changes that are not "substantial", defined with reference to the familiar 'materiality' tests established by the 2008 Presstext judgment.



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



## Presstext v Austria (24 September 2009)

### Para. 34

*In order to ensure transparency of procedures and equal treatment of tenderers, **amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract** (see, to that effect, Case C-337/98 Commission v France [2000] ECR I-8377, paragraphs 44 and 46).*

**Borderline:** new tenderers would have been allowed to enter the tender had the amendment been introduced during the tender stage



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



## The *Presstext* test

A change is substantial if :

1. there are conditions introduced which, had they been part of the initial award procedure, would have allowed for the admission of **tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted**;
2. the scope of the contract is **extended considerably to encompass services not initially covered**; or
3. the **economic balance of the contract is changed in favour of the supplier** in a manner which was not provided for in the terms of the initial tender documents.

As a general rule, if only one of these elements applies, this strongly suggests that the change is material. **Seen in the light of public procurement, the change must then be considered a new contract and a new contract award procedure must ensue.**



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



## Directives EU 2014/24 and /25

Art. 72(2)

However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



## Transposition in EU Member States - UK

### Art. 72 The Public Contracts Regulation 2015

- a catalogue of circumstances in which the contract can be modified without a new procurement procedure; concentration on monetary value of the contract and effectiveness of contract performance
- strong position of the contracting authority

(1) Contracts and framework agreements may be modified **without a new procurement procedure** in accordance with this Part in any of the following cases:

(b) **for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor,**

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, or

(ii) would cause **significant inconvenience or substantial duplication of costs** for the contracting authority, provided that any increase in price does not exceed 50% of the value of the original contract; (...)



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



## Public Procurement Laws ↔ FIDIC Forms

- **Better correlation between public procurement laws and the FIDIC Forms**
- Variations finally workable?
- More flexibilities post-tender under the competitive dialogue;
- An authority may clarify, specify and "optimise" final tenders;
- Negotiations with the preferred bidder allowed (within certain parameters);
- Innovating partnerships;
- Other developments.



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



## **CONCLUSIONS**

**[rafal.morek@klgates.com](mailto:rafal.morek@klgates.com)**



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016

