


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

# FIDIC-SIDiR-EFCA

## Regional Infrastructure Conference

Krakow  
7 & 8 March 2016

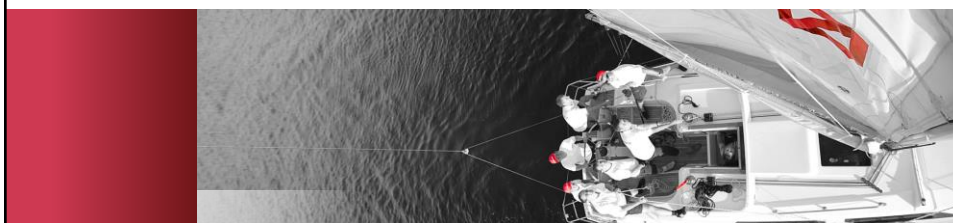
Svitlana Teush, PhD  
Arzinger Law Office, Kyiv , Ukraine



International Federation of Consulting Engineers



## FIDIC Conditions of Contract in the Context of Harmonization of Public Procurement System in Ukraine with EU Standards




Arzinger 

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

## USE OF FIDIC CONTRACTS AND THE INDUSTRY


### CONTEXT: What Remains the Same

- Limited use and awareness of FIDIC forms of contract, primarily, in IFI-funded projects. Mainly, **RB** and **YB** are in use
- No dedicated laws or clarifications, case-law on the use of FIDIC, no translations or ready texts available in Ukrainian
- Engineer's role and functions are not quite understood
- Lack of contract administration discipline and culture
- On the positive side:
  - Narrow interference with GCC
  - Prevalence of international agreements and of IFI's procurement rules and procedures where loans are provided by the World Bank, EBRD, EIB and other IFIs

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016

3



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

## USE OF FIDIC CONTRACTS AND THE INDUSTRY

### CONTEXT: What Remains the Same. - *Cntd.*

- Practical difficulties during implementation (contract administration, audits, claims settlement, etc.)
- Public budget constrains, resistance to contract adjustments, itching for extra safeguards by the public Employer:
  - Narrow interpretation of law and contract by public officers
  - Reducing the Engineer's authority → validation of determinations and variations by addenda
  - Rigid approach to contract changes, waiver of Contractor claims

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016

4



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


## USE OF FIDIC CONTRACTS AND THE INDUSTRY

### CONTEXT: What is Improving. – *Cntd.*

- A longer term view is taken by the industry: efforts to consolidate, match international standards and qualifications, search for international opportunities
- A progress in the industry self-awareness and self-governance
- Certification powers delegated from the ministry to self-governing bodies
- Deregulation; liberalization of construction laws; city-planning reform
- Promotion of energy efficiency and sustainability initiatives
- Paper files are replaced by e-registers, open up to public
- DABs evolve

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016 5



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

## USE OF FIDIC CONTRACTS AND THE INDUSTRY

### CONTEXT: What is Improving. – *Cntd.*

- **Anti-corruption initiatives** ➡ less ample space for abusive creativity, *such as:*
  - Discriminatory/ambiguous description of the subject matter of the contract
  - Package lots
  - Bidder-tailored qualification and selection criteria
  - Qualification or discrimination criteria and requirements? – *e.g.: Experience in analogous projects, availability of manufacturing facilities, producer warranties, etc.*
  - Post-award contract amendments, *etc.*

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016 6



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

## USE OF FIDIC CONTRACTS AND THE INDUSTRY CONTEXT: What is Improving. – *Cntd.*

**APPROXIMATION TO EUROPEAN STANDARDS AND BEST PRACTICES**

- 27.06.2014 – **Association Agreement** (AA) was signed by EU and Ukraine. Provisional application of some chapters.  
On 1.01. 2016 - DCFTA (free trade agreement) enacted
- Gradual alignment and implementation with phases and indicative time schedules, ample international support:
  - **6 months** – for implementation roadmap, compliance with Directive's principles and terms, institutional reform
  - Up to **8 years** – for completion of approximation and reforms
- **NB:** Reference is made to the "old" Directive 2004/18/EC

Krakow, 7 & 8 March 2016

 International Federation of Consulting Engineers



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

## APPROXIMATION TO EUROPEAN PATTERNS AND BEST PRACTICES. – *Cntd.*

***Status Quo*** to mind:

- EU directives and regulations are not directly applicable
- No direct jurisdiction of ECJ and other EU bodies over Ukraine. Their decisions are not binding or enforceable
- Ukrainian public officers/judges are barely familiar with EU/international law and practices

Krakow, 7 & 8 March 2016

 International Federation of Consulting Engineers




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

## THE NEW LAW ON PUBLIC PROCUREMENT IN UKRAINE

- New Public Procurement Law adopted on 25.12.2015

TYPE OF PROCUREMENT	Supply of goods and service contracts	Work contracts
THRESHOLDS	UAH 200, 000 (ca. EUR 7,000)	UAH 1,500 million (ca. EUR 50,000)

- Cancellation of discriminatory/ protectionist criteria for bidders (e.g., availability of own manufacturing facilities in Ukraine's territory)
- Activation of application for tender results' review and streamlining approaches by review bodies
- Reduction of procedures – open tender, competitive dialogue, negotiation procedure

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016 9

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

## THE NEW LAW ON PUBLIC PROCUREMENT IN UKRAINE. - *Cntd.*

- Mandatory system of *E-PROCUREMENT* is to be implemented in stages
- Presently – *PROZORRO* e-system, testing mode, price-only bids
- Mandatory e-procurement:
  - Since 1.04.2016 – by central authorities and monopolies
  - Since 1.08.2016 – by all contracting authorities
- E-procurement platform to be further integrated with e-data on annual procurement plans, public funds' spending and other public registers
- Notices to be published in EU (after 2017), after implementation of common procurement vocabulary (CPV)

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016 10

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

## PUBLIC PROCUREMENT IN UKRAINE: Is it All About the Price?

- **MEAT** is the award criteria
  - **LOWEST PRICE** - *is not imposed by law*
  - **QBS** - *n/a*
- Price component dominates:
 

“Weighting” (share) of price should not be less than:

**70%** - the new law, except for the competitive dialogue

**(50%)** in all cases –the old law)
- Selection criteria other than price – narrower wording compared to the Directive: payment terms, timing, warranty, maintenance costs, transfer of know-how, capacity building
- Draft bill: “*entire life-cycle costs*”, but deleted

Krakow, 7 & 8 March 2016

 International Federation of Consulting Engineers

11




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

## UNFAMILIAR PRACTICES - for the time being


- Abnormally low tenders are not mentioned by law.
 

**BUT:** Collusion (leading to the distortion of tender results) may be inferred. Risk of tender cancellation, liability, negative projection on future bids
- No provision for substantial amendment thresholds
- No self-declaration/ESPD
- No automatic disqualification of contractors based on history of past performance, *etc.*
- Contract modification post-award **?**

Krakow, 7 & 8 March 2016

 International Federation of Consulting Engineers

12



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

**CONTRACT MODIFICATION POST AWARD. – Cntd.**


**Amendment of Essential Terms of a Procurement Contract**

↓

**A New Procurement Procedure**

**EXCEPTIONS:**

- ❖ Decrease of the procurement volume
- ❖ Change in the unit of goods not >10% in case of market fluctuations, without increase in the total contract amount
- ❖ Improvement in the procurement quality without increase of the contract amount
- ❖ Agreed decrease of the contract amount without changing quantity (volume) or quality of goods, works or services

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016

13

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

**CONTRACT MODIFICATION POST AWARD. – Cntd.**

**EXCEPTIONS – 2:**

- ❖ Change in price or other contract terms with regard to changes in tax and duties
- ❖ Changes of consumer index, exchange rates, stock market rates, regulated tariffs, etc. – if an adjustment mechanism is set by contract
- ❖ Extension of the contract term where there are documented objective circumstances (including force majeure, lack of financing) - if such change will not increase the contract amount

 International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016

14



## CONTRACT MODIFICATION POST AWARD. – *Cntd.*

- No provision is in Ukraine's PP law for contract modification in case of:
  - succession/ replacement of the contractor
  - substantiality/ material difference, unforeseeability
  - Expediency, reasonability, convenience or duplication (*e.g.*, for additional works)
- Exhaustive list of grounds for modification is set by law.  
Revision clauses of a contract are supplementary



International Federation of Consulting Engineers

Krakow, 7 &amp; 8 March 2016



## IS IT TIME NOW IN UKRAINE FOR INDUCING FIDIC'S BEST PRACTICES?

- New PP law and implementation practices, more closely aligned with international standards
- EU-Ukraine Association Agreement is to prompt the country progress, open up and approximate markets
- The growing role and broader powers are vested in the engineering society. Engineers are looking to become more competitive and internationalized
- Energy efficiency and sustainability topics climb on the agenda
- More infrastructure and energy projects are internationally funded in Ukraine, high-quality engineer's input is in demand



International Federation of Consulting Engineers

Krakow, 7 &amp; 8 March 2016





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



**Arzinger** 

**Head Office**  
Eurasia Business Centre  
75, Zhylyanska St., 5<sup>th</sup> Floor; 01032, Kyiv, Ukraine;  
Tel: +38 044 390 55 33; Fax: +38 044 390 55 40  
Mob: + 38 067 982 18 48, + 38 067 247 79 90

**West Ukrainian Branch**  
6, Generala Chuprynky St., Office 1, 79013, Lviv, Ukraine;  
Tel: +38 032 242 96 96; Fax: +38 032 242 96 95

**South Ukrainian Branch**  
Pokrovsky Business Centre  
33, Zhukovskogo st., 6th Floor, office 601, 65045, Odesa, Ukraine;  
Tel: +38 048 711 74 74; Fax: +38 048 249 62 45

[Svirlana.Teush@arzinger.ua](mailto:Svirlana.Teush@arzinger.ua)



Looking forward to our future cooperation!



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



17

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

## Fields of Activities

<p>Corporate Law / M&amp;A Real Estate &amp; Construction Antitrust and Competition Intellectual Property Dispute Resolution Public Procurement Tax / International Tax Banking &amp; Finance Public Private Partnership Employment Capital Markets / Private Equity / Investment Regulatory Debt Collection Bankruptcy White Collar Defense Representation in the European Court of Human Rights</p>	<p>Energy Food and Beverages Retail Hospitality Telecommunications Agriculture Infrastructure Transport Insurance Automotive Banks and Financial Institutions Investment Banking and Corporate Finance Private Equity Healthcare and Pharmaceuticals Information Technology</p>
---	---



International Federation of Consulting Engineers

Krakow, 7 & 8 March 2016



18



Thank you for your attention!

---

Arzinger 