WELCOME TO
BIDDERS CONFERENCE
SECTION 2: USER GUIDE TO FIDIC
“RED BOOK”

10 MARCH 2011
VENUE: OSHAKATI
TIME: 09H30
WHO IS OMUGONGO?

A Joint Venture Consortium formed between:

- Jordaan Oosthuysen Nangolo Quantity Surveyors
- Lithon Project Consultants (Pty) Ltd
- Kwezi V3 Engineers (Pty) Ltd
- Consulting Services Africa CC
- Mackintosh Lautenbach Architects
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ABOUT THIS PROJECT

- IFB/TENDER No. MCAN/COM/IFB 1A01002 (LOT 1 & 2) /1D01002/3 (LOT 3) (OHANGWENA REGION)
- LOT 1 (NANGHONA CS, OMAKONDO CS, ONANGULO CS, SHIKUDULE CS, TULILONGENI CS)
- LOT 2 (ETSAPA CS, IIKELO CS, ONAMUKULO CS, ONANKALI NORTH CS, OUPILI CS)
- LOT 3 (HELAO NAFIDI CS, OSHAKATI REGIONAL)
FIDIC ‘RED BOOK’ USER GUIDE

CONDITIONS OF CONTRACT FOR CONSTRUCTION: For Building and Engineering Works Designed by Employer
Background of the Red book

- A globally accepted contract
- A common basis for comparing tenders
- Genesis:
  - After World War II a need for a common contract was felt to procure projects,
  - 1945: Institution of Civil Engineers and the Federation of Civil Engineering Contractors in the United Kingdom, produced **ICE Form** (General Conditions of Contract and Forms of Tender, Agreement and Bond for use in connection with Works of Civil Engineering Construction)
  - In August 1957, the Conditions of Contract (International) for Works of Civil Engineering Construction was published. This was based on the ICE Form described above, and was also published in two parts. The publisher was Federation Internationale des Ingenieurs Conseils (the International Federation of Consulting Engineers, **FIDIC**). Because of the long name it was referred based on its cover colour ‘red’ as Red book
FIDIC is the international federation of duly elected associations of Consulting Engineers representing the profession in their respective country. To qualify for membership, an association must demonstrate that its statutes, bylaws and regulations ensure that its members comply with the ethics and professional code of practice of a Consulting Engineer as outlined and according to the principles endorsed by FIDIC.
Concepts of the Red Book

- Its legal concepts are based on the **common law** system
- Consulting Engineer named by the Employer but trusted by both parties to the contract and referred to as the ‘**Engineer**’=Principal agent
- Remuneration principal is based on a **re-measurement contract with a provisional bills of quantities** which serves as a basis for final re-measurement and payment as certificated by the Engineer
- Responsibilities and liabilities are based on **risks sharing**
- **Diversify application** of legal principle with option for the applicable law of contract whether local (Namibian) or international.
- There are **three alternatives** in respect of the determination of applicable law of the contract:
  - where there is an **express choice** of the applicable law,
  - where there is an **inferred choice** of applicable law;
  - Where there is **no choice** of the applicable law.
The Applicable Contract Law

- There are **four clauses** in the Red Book which do form the legal framework of the contract. These clauses 1.13, 1.4, 6.4, and 13.7
- Clause 1.4 of the Red Book provides for the law of the contract, usually referred to as ‘**applicable law of the contract**’ to be specified in Part II of the conditions.
- Clause 1.13 and 6.4 requires the Contractor to conform in all respects with **all national statutes, ordinances, laws, regulations and by laws of any local or other duly constituted authority** in connection with the execution and completion of the works and the remedying of any defects therein.
- Clause 13.7 provides for the possibility of their **introducing or making changes** to already existing national or state statute, ordinance, decree or other law or any regulation or bylaw of any local or other duly constituted authority in the country in which the works are being, or are to be, executed.
Contract General Principles

- ‘the Contractor gets paid for the work performed and the Employer gets the right to work in return’ (reciprocity)

- Prerequisites of a binding Contract: To be legally binding and enforceable under the common law system, the contract must satisfy the following prerequisites:
  - Intent
  - Agreement
  - Consent
  - Legal priority
  - Legal capacity
  - Legality of Objectives
Performance of a Contract

- Contract performances mean discharging of responsibility to each party of the contract.
- Contractors’ responsibilities are two fold: firstly completion of work, and secondly remedy of contractual defects.
- Employers’ responsibility is to effect payment timely, within 56 days, as per clause 14.7.
- Contractor is to lodge a performance security within 28 days of receiving the Letter of acceptance as per clause 4.2.
- Engineer (Employer agent) must issue a performance certificate ‘certificate of completion’ within 28 days after completion of Defects Notification Periods clause 11.9.
Consulting Engineer Services

- Services of Engineer/Principal Agent may consist of the following as per clause 3:
  - Consulting services incl Pre-investment studies
  - Design, preparation of documents and supervision
  - Specialized design and development services
  - Project management
- Engineer as a Designer/Employer’s Principal Agent
- Engineer as an active/reactive/passive duties and authority
- Engineer as a Supervisor
- Engineer as Certifier/Adjudicator or Quasi arbitrator
- Engineers’ duty is to be responsible and liable
  - Towards the Employer, the third parties, Contractor and society.
  - So as impartial, honesty and professional integrity.

Note: engineer has no authority to amend the contract.
Re-measurement of works

- **Employer accepts the risk of variation** in the quantities finally measured over those originally estimated as well as the risk of variation in some of the rates and prices tendered.

- This is practically relevant in civil engineering works with high content of work below the ground surface where the quantities are unpredictable. With building works, only earthworks, foundations, and external service such as electrical, mechanical, water and sewer is applicable.

- The Red Book, like its ICE module, is based on this category of contract with the **Bills of Quantities (clause 12.2) which is used for the final re-measurement** of all the items of work executed and for valuing the final contract price.
Contractor’s obligation

- Contractor’s obligations under the Red Book revolve around five main areas, clause 4:
  - **Obtain Access to site** (clause 2.1) after furnishing performance security clause 4.2 within 28 days.
  - the construction and completion of the works with due diligence and within the time for completion as contemplated in the contract reporting clause 4.21
  - the use of materials, plant and workmanship as described in the contract and in accordance with the Engineer’s instructions:
  - the provision of securities, indemnities (clause 17.1) and insurances (clause 18.1, 18.2, 18.3 & 18.4) in respect of such work during the contract period;
  - the supply of information and notices required for the execution and completion of works;
  - the performance of certain administrative and other functions, (including, if explicitly required, the design of certain element) to facilitate the process of construction and its various activities.

- The above obligations can be categorized as:
  - **Pre-construction** stage
  - **During construction** and up to substantial completion of the works
  - **After substantial completion** of the works.
Claims and Counterclaims

- A claim is defined as a general term of assertion of a right to money, property, or to remedy. A counterclaim is defined as an assertion which can conveniently be examined and disposed of in action initiated by another party (the Oxford Companion to Law).

- Claims in construction contracts may be based on any one of five legal and non-legal concepts (clause 20.1).
  - A claim under the contract based on the grounds that a particular provision of that contract entitles a claimant to remedy which is specified if a certain event occurs.
  - A claim arising out of the contract based on the grounds that the term of the contract had been breached but where the remedy is not designated.
  - A claim under the law of Tort/Delict of the applicable law of contract, based on the grounds of a specific legal rule or principle.
  - A claim where no contract exists between the parties, if one existed it is deemed to be void, based on the principle that an individual has the right to be paid a reasonable remuneration for work done.
  - Ex gratia claims (out of kindness) where there is no legal basis but rather some commercial sense in making a payment.
Delayed Completion & Claims for Extension of Time

- If time is not “of the essence’ in construction contracts, it is at least of fundamental importance!
- A substantiated claim must be lodged within 28 days otherwise it is disallowed, clause 20.1.
- The engineer/principal agent shall react to the claim within 42 days.
- The red book’s clauses 8.4 and 11.3 give ground for extension of time for completion by contractor as well as extension of defects notification period by employers (however not more than 2 years)
Works Programming

Programming involves providing parameters of time into the work activities and ultimately into the project itself. The details which can be highlighted in a network (activities) programme are (clause 8.3):

- **Independence** of one activity from another requiring that neither the start nor the completion time of each is affected by the other.

- **Sequence** of activities showing when one activity cannot start before the completion of another.

- ‘Burst’ describing restrictive activities which when completed allow two or more activities to start.

- ‘Merge’ describing an activity which cannot start unless and until two or more other activities have ended.

- Sub contractors works

- **Timing of activities** in a unit of time which usually depends on the duration of the whole project, and as general rule expressed as one to two per cent of the time-scale of the whole project. This operation also includes an identification of the start and the end of each activity. As well as identification of Critical path

- Contractor has **28 days** from the appointment days to provide PG
• Red book allows for parties to settle a dispute amicably, without the need for arbitration for example through direct negotiation, conciliation, mediation and other forms of alternative dispute resolutions. Clause 20.5

• There should be trust and confidentiality on both parties for there to be amicable settlement of a dispute.

• Amicable settlement has been introduced from the Fourth Edition of the Red Book as a necessary step in encouraging parties to resolve the dispute amicably before a dispute can be referred to arbitration.

• Amicable settlement is the most effective and least costly for parties intending on having disputes resolved promptly!

• NEXT STAGE ALLOWED IN THE RED BOOK IS REFER THE DISPUTE TO DISPUTE ADJUDICATION BOARD (DAB). The name of individuals forming this board will be nominated by Engineer (on behalf of Employer and contractor)Clause 20.2
Dispute Settlement: Arbitration

- Many methods of resolving disputes have evolved over the centuries. The most familiar in civilized societies are: Negotiation; Litigation; Conciliation; Meditation; and Arbitration.

- Where negotiation fails in the construction contracts and in particular in the civil engineering and building works fields, arbitration (clause 20.6) is traditionally chosen as the appropriate and the most effective method of resolution. This choice is made because of the many inherent advantages in arbitration, especially where there is a technical dispute to be resolved. It is worth mentioning that a Contra Referendum Rule has been adopted by most of arbitration tribunals.

- International arbitration of dispute is recommended over litigation in national courts.

- Thus the rules of Arbitration as approved by the UNITED NATIONS are to be observed. Arbitrators will precede over the dispute, whose decision shall be final and binding to both parties!

- THANK YOU AND GOOD LUCK!