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Second Consultation Meeting
on the Fertilizer Industry
Innsbruck, Austria, 6-10 November 1978

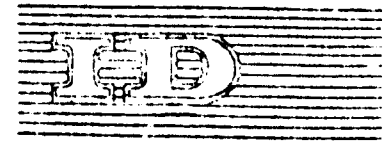
REPORT OF THE WORKING GROUP ON THE UNIDO
MODEL FORM OF COST REIMBURSIBLE CONTRACT
FOR THE CONSTRUCTION OF A FERTILIZER PLANT

Draft for approval
presented by the
Chairman: Paul Pothén

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CONTRACT FOR THE CONSTRUCTION OF A FERTILIZER PLANT

ADDENDUM

- Page 2, para. 5, line 5: Instead of "decided" read "suggested".
- Page 3, para. 9, line 5: After "in arriving at a" insert "final form of model".
- lines 5 and 6: Delete "definitive and"
- Page 3, para. 11: Add the following sentence: "Due to constraints of time and other practical reasons all articles could not be discussed in detail. It was therefore decided that written comments would be invited on all or any of the articles of the draft Model Form of Cost Reimbursible Contract and annexures."
- Page 5: Title: Instead of "Modifications recommended" read "Modifications discussed"

INTRODUCTION

1. The Working Group on UNIDO Model Form of Cost Reimbursible Contract for the Construction of a Fertilizer Plant was established by the Consultation Meeting to consider item 5(a) of the agenda, proposals on which agreed conclusions might be reached by the Second Consultation Meeting.
2. The Chairman of the Working Group was Paul Pothan, India. The terms of reference of the Group were as follows:
 - (a) To review in detail the preliminary draft of the UNIDO Model Form of Cost Reimbursible Contract for The Construction of a Fertilizer Plant;
 - (b) To recommend modifications required in the Model Form to make it acceptable to purchasers and contractors and hence suitable for publication by UNIDO.
3. The Working Group convened three sessions on 8 and 9 November 1978.
4. The Working Group considered document ID/WG.281/12 and Add.1, the UNIDO Model Form of Cost Reimbursible Contract for the Construction of a Fertilizer Plant. The report of the Working Group is prepared in three parts:
 - I. Summary of discussion ;
 - II. Conclusions and Recommendations of the Working Group;
 - III. Modifications to the Model Form of Cost Reimbursable Contract recommended by the Working Group.

I. SUMMARY OF DISCUSSION

5. The UNIDO secretariat suggested that the Working Group should discuss the preliminary draft of the UNIDO Model Form of Cost Reimbursible Contract for the Construction of a Fertilizer Plant so as to highlight those articles and clauses of the Contract which require modification. It was decided that these modifications should be discussed in the Working Group. Thereafter detailed comments could be submitted to the UNIDO secretariat within a period of 2-3 months so as to enable the UNIDO secretariat to draw up a more definitive draft of the Model Form of Contract for submission to an expert group who could finalize the draft. If after the expert group meeting there were differences still remaining between the viewpoints of the purchasers and the contractors, they could be submitted for finalization to the Third Consultation Meeting. Final approval of the drafts would be obtained from this Meeting.
6. The Working Group approved in general the proposal made by the UNIDO secretariat. Some participants raised a point about the time schedule for the proposed action. It was suggested that revised drafts of (a) the UNIDO Model Form of Cost Reimbursible Contract and (b) the Model Form of Turn-Key Lump-Sum Contract should be ready in 1-2 months after obtaining detailed comments; UNIDO should then convene immediately an expert group meeting with representatives of both contractors and purchasers to finalize the revised texts of these two Model Forms of Contract, allowing participants at least one month to consider the revised text. Some participants proposed that a Consultation Meeting should be convened shortly thereafter to consider the two texts.
7. The Working Group agreed that while only the Cost Reimbursible Contract would be discussed during the course of the present Consultation Meeting, both the Cost Reimbursible and the Turn-Key Lump-Sum Contracts should be revised by the UNIDO secretariat, considered at the expert group meeting and submitted to the next Consultation Meeting for finalization.

8. The Working Group appreciated the work of the UNIDO Secretariat and the consultants in drawing up the Model Forms of Contract.

9. However, the Working Group recognized that the draft of the Cost Reimbursable Contract as presently submitted did not fully take into account the points of view of contractors. Therefore their point of view expressed at the present Meeting and in the subsequent period would be valuable in arriving at a contract which would be definitive and acceptable to both purchaser and contractor.

10. The Working Group discussed the types of contract which would be most needed by developing countries. It was pointed out that this has been discussed in a document "Guidelines for the use of the UNIDO Model Forms of Contract" which was circulated in draft form. The actual type of contract which would be used by developing countries would depend not only on the degree of sophistication which they had attained in the development of its fertilizer industry, but also on the type and conditions of financing which were available. For instance, international financing institutions often prefer the Cost Reimbursable Contract because it involved a larger number of individual purchases of machinery.

11. The Working Group thereafter discussed the UNIDO Model Form of Cost Reimbursable Contract, article-by-article. The final part of this report provides a summary of the discussion and modifications suggested by the Working Group; amendments, the addition of new clauses and reconsideration of certain clauses were proposed. It was recommended that these modifications would be considered for incorporation in the revised text to be prepared by the UNIDO Secretariat, along with the suggestions to be received later in writing from the participants at the Consultation Meeting.

II . CONCLUSIONS AND RECOMMENDATIONS OF THE WORKING GROUP

1. The Working Group recommends that the UNIDO secretariat:
 - (a) invites written comments on the Model Form of (a) Cost Reimbursible Contract and (b) Turn-key Lump-sum Contract to be submitted before 31 January 1979 to the Head, Negotiations Section, UNIDO.
 - (b) consolidate these comments and incorporates them as appropriate in a revised text of each Model Form of Contract; this work should be completed by 31 March 1979;
 - (c) organizes an Expert Group Meeting to which contractors and purchasers from developed and developing countries should be invited; the meeting should be convened in May 1979 to consider and finalize the revised text of the two model forms of contract prepared by UNIDO;
 - (d) circulates the final draft to the Governments of member countries of UNIDO and other concerned parties;
 - (e) presents the final draft to the Third Consultation Meeting on the Fertilizer Industry;

2. The Working Group recommends that the UNIDO secretariat continues to work on the model form of Semi-Turn-key Contract and the Contract for the supply of Know-how and Engineering Services.

III. MODIFICATIONS RECOMMENDED BY THE WORKING GROUP ON INDIVIDUAL ARTICLES
OF THE UNIDO MODEL FORM OF COST REIMBURSIBLE CONTRACT
FOR THE CONSTRUCTION OF A FERTILIZER PLANT*/

ARTICLE 1

A new clause should be added defining "vendor".

ARTICLE 2

Clause 2.1. The following should be included: "model, reliable efficient plant suitable to the location".

Clause 2.4. The approval by the purchaser within a limited time of all the drawings and other documents sent by the contractor should be provided for. This could be inserted in another article, if desired.

Clause 2.5. The printout and deviation of the critical path should be available monthly; the critical path itself should be changed about four times during the contract or when slippage becomes 10 per cent or more. The critical part network shall be computerized by the contractor.

Clause 2.6.2. Reference should be made to the civil engineering construction of the plant building.

Clause 2.6.6. The word "minimum" should be eliminated.

ARTICLE 3

The title of this article should be modified.

A new clause should be added to include the possibility of the civil engineering design being undertaken by the contractor.

Clause 3.2.7. A modification should be made to include contractor responsibility for the expediting of all equipment.

Clause 3.2.9. The word "agreement" should be replaced by the word "contract".

Clause 3.2.12. The word "review" should be replaced by the word "supervised".

Clause 3.2.21. The words "as far as possible" should be eliminated.

*/ ID/WG.281/12 and Add.1.

ARTICLE 4

Clause 4.2. The last sentence of the clause "both parties to the contract recognise that time is the essence of the Contract" should be eliminated as this is covered elsewhere in the contract.

Clause 4.10. A modification should be made to indicate that the contractor shall undertake the commitments contained in this clause in association with the purchaser and this clause should exclude any liability of the contractor for non-performance by the vendors.

Clause 4.14. The words "correct the plant" should be modified so that the contractor's responsibility is for assistance. In this clause also the "period of one year after the plant has been accepted" should be modified to a maximum period (to be decided upon) after the effective date of the contract.

Clause 4.15. A modification should be made to indicate that the contractor should supervise the training.

Clause 4.16. This clause should be embodied in a separate contract. However, the clause may be modified to include an obligation by the contractor to enter into such a separate contract.

Clause 4.18. This clause should be further detailed to provide inclusion or elimination of telex, telephone and similar facilities.

A new clause should be added in this Article requiring the contractor to produce a set of "as built" drawings at the end of the mechanical completion of the plant.

ARTICLE 5

Clause 5.1. This clause should be modified to have obligations on behalf of the purchaser similar to the obligations of the contractor under clause 4.1.

Clause 5.2. This clause should be modified so that the site should be accessible even before the plot plan is ready. It is suggested that the site should be available within three months.

Clause 5.4. This clause should specify the time for all approvals whether by the purchaser or by the lending agencies concerned.

Clause 5.5. This clause should include the pre-commissioning and commissioning periods.

Clause 5.6. The words "use of the contractor" should be replaced by the words "start up and operation of the plant, under the supervision of the contractor".

It was suggested that some provision should be made in this article to cover abnormal use of spare parts during the pre-commissioning period.

ARTICLE 6

A new clause should be added giving the purchaser the right to send his personnel to the contractor's office to participate in design.

Clause 6.2. This clause should be modified to indicate that the purchaser has the right to appoint his own manager.

Clause 6.4. The clause refers to dates specified in Article 10. This should be made more definite, and the date contained in Article 10 should be correlated with this clause.

Clause 6.7. The pre-qualification notices should be issued earlier than those contemplated in the model contract.

A new clause may be inserted indicating the payment procedures for offices of the contractor at site and of the purchaser in the overseas office of the contractor.

ARTICLE 7

A new clause should be added that will restrict the contractor's carrying out his functions in more than one office because otherwise the work would be dispersed too much for adequate control by the purchaser.

ARTICLE 11

In sub-clause 11.1.1 and clause 11.7 the articles mentioned should read "Article 11.2 to 11.5".

Clause 11.8. The words "his services" in the third line should be replaced by the words "for which the contractor is responsible".

In clause 11.13 and 11.14 all the percentages for payments mentioned should be placed in brackets because they are negotiable.

Clause 11.15. A modification should be made so that the payments are subsequently made.

ARTICLE 12

A substantial discussion took place on the provision for performance bonds for 15 per cent or more of the total contract, particularly as the bond was callable without pre-conditions and without the knowledge of the contractor.

It was suggested that the rules of the International Chamber of Commerce for bonds to meet contractor's guarantees should be examined and clause 12.1 modified accordingly.

ARTICLE 14

Clause 14.1 and subsequent clauses should be re-written so that both the contractor and the purchaser have an obligation to meet at times scheduled.

ARTICLE 16

It was felt that clauses 16.5 and 16.6 and sub-clauses 16.7 and 16.8 should be re-written as in their present form they are too onerous as far as the contractor is concerned.

ARTICLE 19

It was suggested that the stream factor of 330 days per year should be taken out of sub-clause 19.2.1 and placed elsewhere as a guarantee, because the factor could not be demonstrated by a test run. It was agreed, however, that it will be definitively included as a guarantee. There was considerable discussion of clause 19.8 regarding the time for the guarantee test. It was agreed that the 10-day test for the performance guarantee at 100 per cent capacity would be acceptable. It was felt that the 20-day test for sustained continuous operation on the basis of sub-clauses 19.8.1.1 and 19.8.2.1 might be too little and the period should be increased to 90 days. Some of the delegates, however, felt that the provision may not be acceptable. The matter would be further discussed at the subsequent meetings of the expert working group.

ARTICLE 20

There was substantial discussion on clauses 20.4 and 20.5, where there is an implied obligation for the contractor to replace all equipment purchased under his specifications and from vendors approved by him, subject to the overall limitation of the contractor's liability. It was felt by some of the delegates representing the contractor's point of view that in a cost reimbursable contract they should have no liability for the cost of replacement of equipment, whereas delegates who were basically purchasers felt that if the equipment was purchased under the contractor's specifications and from vendors approved by the contractor, there was a liability on the part of the contractor to pay the cost of replacing such equipment if found faulty.

ARTICLE 21

Clause 21.1. A modification should be made to make clear that the clause refers only to equipment which was directly supplied by the contractor.

ARTICLE 22

Clause 22.2.1. The word "possesses" in the first line should be replaced by the word "has".

ARTICLE 23

Clause 23.3. The clause should be modified in the light of the decisions taken on clauses 20.4 and 25.1.

ARTICLE 24

Clause 24.1. The article referred to in clause 24.1(b) should be Article 11.6 instead of Article 18.6. In the last paragraph of clause 24.1 the words "of acceptance of the plant" should be deleted.

Clause 24.2. It was felt that this clause may be removed, because it is unnecessary in a cost reimbursable contract to give bonuses for increases in capacity as to do so may lead to over-designing of the plant.

ARTICLE 25

Clause 25.1. It was felt that the clause should be re-examined in view of the wording of clause 27.1 so as to avoid duplication.

ARTICLE 26

It was agreed that clause 26.1.3 should be modified so as to bring it into line with the discussions of the Expert Working Group Meeting on Insurance in September 1978. It was also agreed that the rest of this clause and annexure xxviii should be modified so as to clarify the nature of the insurance policies mentioned therein. It was also suggested that this article and annexure xxviii should be revised to bring the phraseology into line with other internationally recognized contracts such as those of FIDIC and the Institute of Chemical Engineers (UK).

ARTICLE 28

Clause 28.3. It was felt that the technical adviser should not be the final arbitrator on the quantum of payment but a separate conciliator should be appointed who should be acceptable to both parties. It was agreed that a new article should be added to provide for variations due to unforeseen circumstances (e.g. change of feed-stocks).

ARTICLE 30

Clause 30.7. It was felt by several purchasers that they should not be prohibited from modifying or expanding the plant if the contractor was unwilling or unable to bring the plant up to capacity, or in cases of expansion where the contractor or the licensor was not willing to license the expansion.

Contractors, on the other hand, felt that purchasers were at liberty to do so provided the new contractor (if a third party) was acceptable to the project licensor, and the new contractor signed a secrecy agreement.

Purchasers felt that good contractors might not be willing to sign such agreements, and that would create an impasse.

It was agreed that UNIDO should be requested to collect information on actual cases and to suggest appropriate legal language, leaving the issue to the subsequent contractor-purchaser discussions.

It was agreed that a new clause should be added to allow expatriate personnel to operate the plant or further train purchasers' personnel, if this is refused by the contractor, after completion of the contract.

ARTICLE 34

Clause 34.1. The words "or other industrial disturbance" should be deleted from lines 17 and 18, and line 20 should read "CONTRACTOR's control, to be proven to the reasonable satisfaction of the PURCHASER".

Clauses 34.4, 34.5 and 34.6 should be reconciled with each other and with clause 36.1.

ARTICLE 39

Clause 39.2. A modification should be made to provide a total budgetary price to be reasonably well estimated by the contractor within four months after the effective date.

Sub-clauses (a) and (b) of this clause should be modified to provide penalties and incentives to the contractor for failing to meet or meeting within (10 per cent) the overall budgetary estimate or the f.o.b. price of the equipment.

An alternative clause 39.2 involving a target price with cost sharing if costs are above or below the target price, should also be considered by the Expert Working Group.

ARTICLES 45 and 46

It was pointed out that the cash flow of the contractor could be effected during the settlement of disputes. Articles 45 and 46 might therefore need some modification. Suggestions will be made by contractors later.

Clause 46.1(a). The word "tenth" in the sixth line of clause 46.1(a) should be replaced by the word "twentieth".

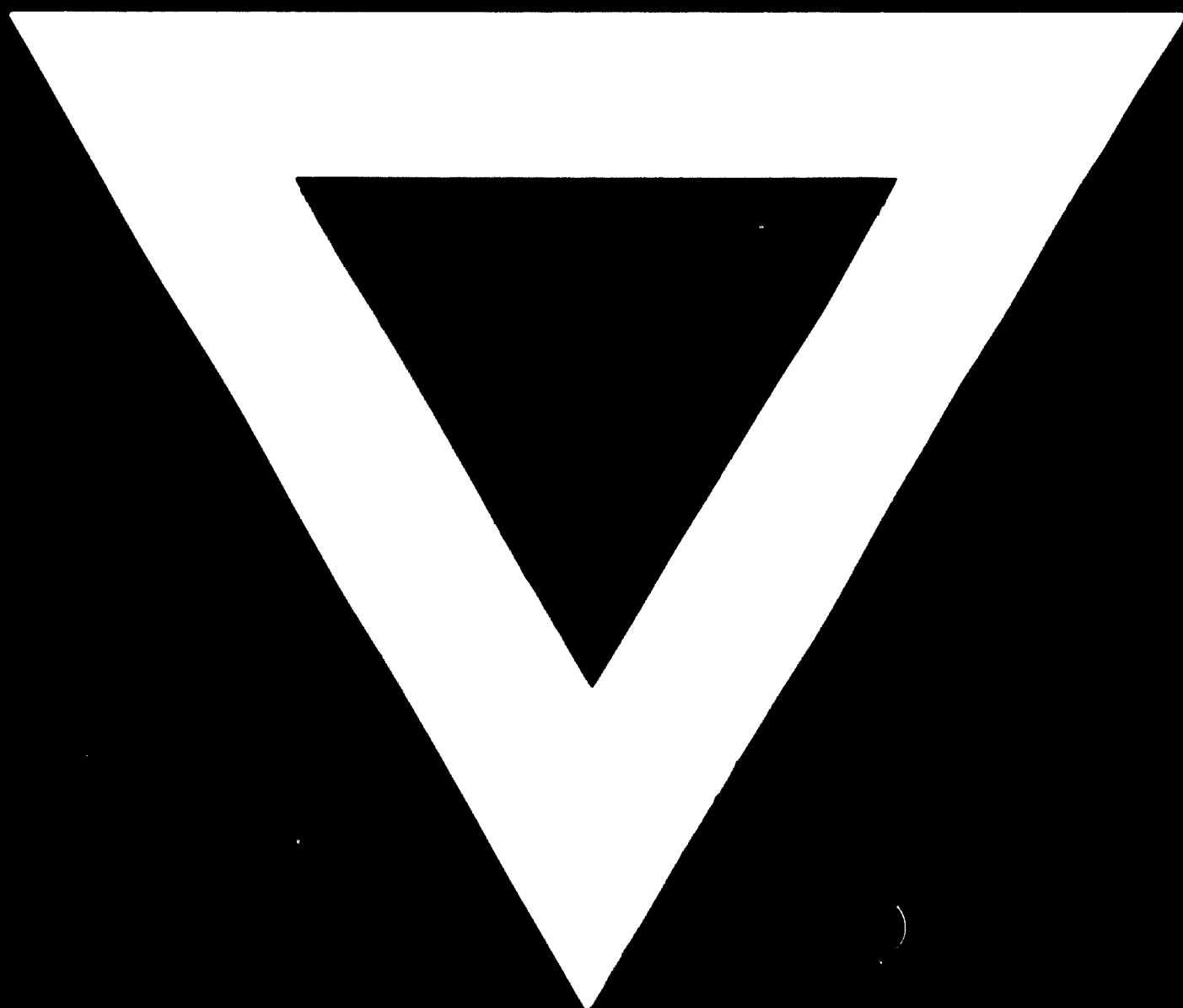
Details should be provided in this clause for the actual procedure to be adopted in the settlement of disputes and in arbitration.

New Articles

It was proposed that two new Articles; "Conditions of Financing Agencies" and "Government Taxes" should be added or their substance included as clauses in existing Articles.



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