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Fifth Meeting of the Working Group on  
Model Contracts for Fertilizer Plants  
Vienna, 26-30 March 1979

REPORT OF THE MEETING\*

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The Preliminary Draft of the UNIDO Model Form of Cost Reimbursable Contract  
(ID/WG.281/12)

Based on comments received, the following major changes were discussed and agreed:

Article 1

The following definitions were changed:

- 1.5 The Technical Advisor
- 1.7 The Works
- 1.13 The Materials
- 1.22 Battery Limits
- 1.26 Absolute Guarantees
- 1.30 Acceptance of the Complex
- 1.33 Technical Documentation

It was agreed to add definitions for "Vendor", "Initial Operation" and "Warranty".

Article 2 The contract would be made specific for 1000 tons per day Ammonia and 1725 tons per day Urea complex but a footnote would be added to indicate that it can be adapted for use of other types of fertilizer plant.

Clause 2.6 would be changed so that both Purchaser and Contractor are obliged to make every endeavour to follow the timetable suggested on page 11.

Article 3 This article will be worded OVERALL SCOPE OF WORK AND THE DIVISION OF RESPONSIBILITY. Clauses 3.2.1 to 3.2.23 will be added as appropriate to Articles 4 and 5 and the new Article 3.2 will only indicate the division of responsibilities between the Contractor and the Purchaser.

Articles 4 and 5 will include Articles 3.2.1 to 3.2.23. In the original 3.2 the following clauses were amended: 1, 4, 5, 6, 7, 8, 9, 10, 12, 16, 17, 21, 23. Article 3.3 was also amended.

In the original Article 4 the following clauses were amended: 1, 2, 4, 5, 6.1, 7, 8, 9.

Article 5 Only minor changes were made.

Article 6.1 Changes were agreed to Article 6.1, 6.7. Most of Article 6.9 would be transferred to Article 10. In addition, a specimen copy of the purchasing protocol would be included in the Guidelines. A new clause 6.14 will be added enabling engineers of the Purchaser to be present at the design stage.

Article 7 The modification to Article 7 suggested by the Consultation Meeting will be added to Article 6.

Article 8 Only minor changes were made.

Article 9 This article will make it clear that the Contractor deals on behalf of the Purchaser with vendors of equipment.

Article 10 10.2.2 - the Contractor's comments were accepted.  
10.10 - the Article 10.10 will make reference to Article 21 which will contain the main substance hitherto included in 10.10.  
10.11 - will be included in a new Clause 47 dealing with financing agencies and arrangements.

Article 11.1.2 which deals with taxes will be modified to take account of the Contractor's comments.

Article 11.7 which deals with fixed prices will be modified.

Other sub-articles in which changes have been agreed are 11.8, 11.12, 11.14, and 11.15 pertaining to the payment conditions.

In Article 12, changes were agreed to in sub-articles 12.2 and 12.3.

Contractors raised doubts about the simultaneous obligation to give a performance bond for 15% and a bank guarantee for the 10% retention, i.e. 25% in all, during the period between mechanical completion of the plant and the acceptance of the plant. It was agreed to consider reducing this to 5% for the performance bond and 10% for the bank guarantee, i.e. 15% in all for this period, when this article is redrafted bearing in mind that this is 15% of the Contractor's fees (about \$20 million) as described in Article 11.7. The performance bond to be included with the Model Contract would also be prepared.

Some of the suggestions pertaining to sub-articles 11.19 and 11.24 were also accepted.

In Article 13 the Contractors wanted the right to terminate or re-consider prices if the Letter of Credit was not opened by the Purchaser within 6 months. This was considered acceptable provided the advance payment was returned.

The Contractors have objected to the use of the words "time of essence" which occurs in Article 14 and throughout the Contract. It was felt that this is an important legal safeguard for the Purchaser. However, its legal importance would be further discussed with the Contractors during the proposed meeting, 14-17 May.

In Article 15 changes were agreed to sub-articles 15.4, 15.5, 15.6 and 15.7 and a new clause was added at 15.10(b) to cover inadequate services by the Contractor. Changes were also agreed in 15.3, 15.14 and 15.15.

The Second Consultation Meeting suggested that sub-articles 16.5, 16.6, 16.7 and 16.8 should be changed as they were too onerous for the Contractor in a cost reimbursable contract. These articles were discussed and will be re-written. Some changes were also agreed in sub-articles 16.1 and 16.4.

In Article 17 changes were accepted in sub-articles 17.1, 17.2, 17.3, 17.4 and 17.5.

In Article 18 some changes were agreed in sub-articles 18.2 and 18.8.

In Article 19 comments have been raised by one of the purchasers that there should be guarantees for the generating capacity and consumption of utilities in the power station. Since the power station would probably be purchased as a package, it would be better to include these in the direct agreement with the vendor. However, this would be indicated in the Guidelines.

Changes were agreed in sub-articles 19.2.1, 19.3.2, 19.4, 19.6.1.2, 19.6.2.1 and 19.6.3.

In various sub-articles of Article 19, Contractors have queried various aspects of the liability for non-fulfillment of Absolute Guarantees. This is extremely important for the Purchaser, and therefore most of the changes suggested could not be accepted. However, further discussions would be held with contractors.

Various contractors wanted to change the test period of 20 days at 90% capacity followed by 10 days at 100% capacity. Since this had been already agreed upon as far ago as the Lahore Seminar (November 1977), this was not changed. Some of the Purchasers wanted the test period increased to 90 days and this was also not accepted because of the previous agreement with the contractors. It was, however, decided to put in the Guidelines that guarantee tests of up to 90 days have been obtained by the developing countries.

Some minor changes were also agreed in sub-articles 19.1.1 and 19.13.1.

The contractors felt that the number of certificates required were too many for a cost-reimbursable contract. It was agreed to reduce these certificates to the certificates for the mechanical completion of the plant and for the acceptance of the plant. The legal implications of granting a provisional acceptance would also be further discussed and finalized at the Lahore meeting.

The contractors wanted the deletion of sub-article 19.15 because this called for the Purchaser having the right to ask for further equipment even after acceptance of the plant and completion of all the guarantee tests required under the contract. The article as worded has no limitation of time. It was decided to consider this further at the Lahore meeting.

In Article 20 the suggestion for the deletion of sub-article 20.2 was accepted and the other clauses were to be re-worded to bring them in line with the reduced number of certificates which were now proposed.

Some minor modifications on sub-articles 20.6 and 20.7 were also agreed.

In Article 21 re-wording of the sub-article was decided upon to bring them in line with the fact that in a cost reimbursable contract the purchase of equipment is by Purchaser directly from vendors on the advice of the Contractor. This has resulted in agreed changes in sub-articles 21.1, 21.2 and 21.3.

In Article 22 the Contractors have taken considerable objection to sub-article 22.2 where the rights of set-off by the Purchaser are included. It was agreed to leave this article in a slightly amended form and to discuss this with the Contractors at the London meeting. It would be advantageous for the Purchasers to have such a clause in the Contract, but all attempts in the past to include such a clause have been unsuccessful.

Some minor changes were also agreed in sub-article 22.4.

Article 23 In Article 23 some changes have been agreed in sub-articles 23.1.1 and a rewording of the sub-article 23.3.

Article 24 There was only one suggestion from the contractors which was in contradiction to what had been previously agreed at various meetings. It was therefore not accepted.

Article 25.1 was re-examined and brought in line with sub-article 27.1 and it was agreed to delete Article 25.3 as this was covered elsewhere in the Contract.

Article 25.4 deals with the overall liability of the Contractor under the Contract. It had been agreed in previous meetings that the obligation to fulfil the Absolute Guarantees would not be limited by an overall liability. The Contractors wishes to reconsider this subject. It is likely that this point will have to be discussed at the Expert Group Meeting to define the exact type of responsibility in a cost reimbursable contract which is required from contractors for the non-fulfillment of Absolute Guarantees.

Article 26 deals with insurance and it was agreed at the Second Consultation Meeting to re-write this article in the light of comments received from the insurance consultants of UNIDO. UNIDO will collect the various comments and this will be further discussed at Lahore.

In Article 27 articles 27.2 and 27.3 were modified to bring them in line with the cost reimbursable contract and various comments of the contractors. However, articles 27.4 and 27.5 were to remain unchanged.

Article 28 Some small changes were agreed in sub-articles 28.2 and 28.3 and 28.5.

A new clause was added as sub-article 28.7 to cover any additional engineering to be undertaken by the Contractor due to legislative or statutory action during the period of the Contract.

In Article 29 sub-articles 29.2 and 29.3 were modified. The main obligation of the Contractor is covered by Article 4.5.

Article 30 There were only minor suggestions to the modifications to Article 30 and a small modification in sub-article 30.2.1 was agreed. However, there were some comments to Article 30.7 relating to the right of the Purchaser to call a third party to expand the plant if the Contractor was unable or unwilling to do it himself, without the obligation of the third party signing a secrecy agreement. This subject will have to be discussed further with the contractors as there are still substantial differences between the Purchaser's viewpoint and that of the Contractor.

In Article 31 changes to sub-articles 31.1 and 31.2 have been agreed.

In Article 32 changes have been made to Article 32.4. In the case of Article 32.5 there was considerable discussion on this article which deals with the termination of the contract if there was any failure on the part of the contractor to disclose any fees, discounts or any other commissions paid by him for obtaining the contract. It was felt by some of the participants that the inclusion of this clause in a model contract would not be desirable. However, this would be considered further by UNIDO.

In Article 33 the whole of articles 33.1 and 33.2 would be reworded so as to bring them in line with each other. In accordance with the suggestions of the Second Consultation Meeting an additional sub-article 33.3 would be added to cover government taxation. It was agreed to accept the principle that government taxation in the Purchaser's country would be reimbursed to the Contractor but the Contractor would refund any amount which he could claim under the double taxation agreements between the Purchaser's country and the Contractor's country. In addition the Contractor would have an obligation to discuss his tax liability in the Purchaser's country with the Purchaser.

In Article 34 only changes were those proposed by the Second Consultation Meeting. However, Article 34.5 was to be further clarified so that payments where force majeure had come into operation would be clearly defined.

In Article 35 minor changes were made in sub-article 35.1 and articles 35.4 and 35.5 were made consistent on a 60 day period. It was agreed to modify Article 35.6 so that termination of the Contract was not automatic after only 30 days of suspension.

In Article 36 a change was agreed to Article 36.1 limiting the Purchaser's right to terminate the Contract.

In Article 37 it was agreed to re-draft all of sub-articles 37.2 to 37.6 inclusive as the articles had certain principles taken from the turn-key contract rather than from a cost-reimbursable contract.

In Article 38 it was agreed to undertake some changes in Article 38.1 and to re-word Article 38.4 and the sub-articles.

In Article 39.1 the Second Consultation Meeting had proposed that an alternative chapter on a target price contract with cost sharing should be included. A draft of this will be prepared and submitted to the Lahore meeting. The title of the article will be changed to reflect this.

The Guidelines would also be modified so that the differences between a target price contract and the type of contracts suggested by Article 39.2 would be clearly differentiated.

There were no basic points in Articles 40 or 41.

In Article 42 the contractors desired that the law governing a contract should be that of a third country and not that of the country in which the plant is situated. This will be discussed further with the contractors.

Changes proposed to Articles 43 and 44 are extremely minor changes and will be incorporated as far as possible.

In Article 45 some changes have been agreed.

In Article 46 the contractors appear to have misread the clause in as much as they felt that the Purchaser is being a judge during arbitration. The clause is being corrected to take care of any misunderstanding on this point. The procedures described in Article 46(b) are to be elaborated.

Some modifications to Articles 46.1(d) and (e) were agreed.

The Second Consultation Meeting suggested the addition of a new article on the conditions of financing agencies and the draft of this article was generally agreed upon.

#### Timetable for future work

A timetable for future work was discussed. The Group would meet again in Lahore from 23 to 30 April 1979.



**G-625**



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