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Agenda Item 4(b)

SECOND DRAFT OF THE UNIDO MODEL FORM OF
TURN-KEY CONTRACT FOR THE
CONSTRUCTION OF A FERTILIZER PLANT*

Comments
prepared by
An International Group of Contractors



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INTRODUCTION

1. When the First Draft of the UNIDO Model Form of Turn-Key Lump-sum Contract was presented to the Expert Group Meeting on UNIDO Model Forms of Contract for Fertilizer Plants held in Vienna, Austria from 26-30 November 1979, the following main comments were made:

- (a) The unequal balance of the interests of Purchaser and Contractor needs to be corrected; the Purchaser was given too much leverage and too much power of intervention for the Contractor to accept the Model Form as in the present draft;
- (b) A comprehensive scheme for manpower training should be a fundamental objective of the contract;
- (c) The Contractor's responsibility for assisting in the management of the plant in the first year of operation and to provide technical advice thereafter should be clearly outlined and also be a fundamental objective;
- (d) The timetable for executing the project should be more clearly defined.

2. The Meeting made the following comments as regards the drafting and presentation:

- (a) The contracts were more elaborate than could be comprehended by the intended users;
- (b) The contracts should be more simple and more clear; repetition and extensive cross-referencing should be eliminated and clauses shortened;
- (c) The order of the Articles should be changed to correspond to the plan of implementation; some Articles could be combined;
- (d) Definitions should be more precise and be used more consistently throughout the contract.

3. The UNIDO Secretariat prepared a Second Draft for the Third Consultation (ID/WG.318/1) in early February 1980 and an advance copy of this was submitted to the contractor's representatives who attended the Expert Group Meeting inviting their written comments.

4. This document contains the comments of contractors which were submitted to UNIDO in response to this invitation. The UNIDO Secretariat is distributing it as a document for the Consultation so that all participants may take these detailed comments into account when they discuss the Second Draft of the UNIDO Model Form of Turn-Key Contract.

CONSOLIDATED COMMENTS UPON THE SECOND DRAFT
OF THE
UNIDO MODEL FORM OF TURNKEY LUMP SUM CONTRACT
FOR THE CONSTRUCTION OF A FERTILISER PLANT
FROM PROCESS PLANT CONTRACTORS IN
FRANCE, JAPAN, UNITED KINGDOM
UNITED STATES OF AMERICA AND WEST GERMANY
FOR SUBMISSION TO THE
THIRD CONSULTATION MEETING ON THE FERTILISER INDUSTRY

GENERAL

- 1 Whilst the philosophy behind this model contract is fundamentally acceptable the principal reservation is that it affords the Purchaser and his Engineer too much right of involvement and interference. This is contrary to normal practice in which the Purchaser for the most part in return for the payment of a lump sum hands over to the Contractor full responsibility for constructing an integrated complex which is handed over complete to the Purchaser only when fully operational.
- 2 The quality of the draft itself leaves very much to be desired:
 - a) It is still much too long - 175 pages without appendices is an unnecessary length
 - b) There is still far too much repetition which gains nothing and involves superfluous cross-referencing
 - c) Bearing in mind its intended purpose this draft is far too complicated - for example 29.10 amongst many others requires careful study by a skilful lawyer to ascertain its proper meaning.
 - d) A contract is meant to be a tool for project staff to use rather than a conundrum for lawyers to puzzle over. It must be written in much simpler language and organised more logically
 - e) Definitions which should be a help to understanding the contract are often imprecise and are not used consistently in the text
- 3 Except where specifically commented upon the contractors consider that all references to time limits, quantities and performance parameters should be left blank in a model form of contract as they will ultimately be a function of case by case needs and negotiation between the parties.
- 4 It is strongly felt that a total redraft of this document bearing the above criteria in mind should be undertaken on the lines that the French have done for the reimbursable draft and the contractors would be willing to offer their services in assisting with this exercise.
- 5 No comments have been offered on the finer detail of the draft, upon typing errors or mistakes in grammar or meaning which do not affect matters of principle as this would make our submission unduly lengthy and such points should be self-correcting in further drafting. Absence of comment therefore does not imply full agreement.

ARTICLE 1 - DEFINITIONS

General

- 1 The purpose of definitions is to act as a shorthand to avoid repeated definition of terms as they occur during the text. There is no point in having definitions of terms which only appear once and where their meaning is self-evident from the context. A considerable number of definitions could be deleted on this account alone.
 - 2 A number of definitions are imprecise, repetitious or even confusing and would be better deleted.
 - 3 Some definitions such as "Work" are not used with any consistency in the text and their existence is a positive hindrance to understanding rather than help.
 - 4 Where definitions are deemed necessary the convention of using them with capital letters throughout the text should be followed and words apparently meaning the same thing should be deleted.
 - 5 On the above grounds we would recommend the deletion of definitions 1.2, 1.6, 1.7, 1.13, 1.14, 1.23, 1.26, 1.34 and 1.42.
-
- 1.5 "Battery Limits" should mean not the facilities but the designated boundary line of points within which all the equipment, machinery and apparatus conforming to the subject of the contract are contained.
 - 1 16 If this definition is to be retained it should be cross-referenced with Article 6.3 and should not say anything different from what appears in that Article.
 - 1.18,1.24 & 1.31 In order to take into account Purchaser's time to issue these certificates acceptance should be defined as the dates the Contractor is entitled to receive such certificates rather than the date upon which they are issued.
 - 1.23 As mentioned above this definition is confusing and duplicates 1.17. Either the reference to the exclusion of materials and civil works should be deleted from 1.17 or 1.23 should define specifically the excluded materials. 1.23 can have no other purpose.
 - 1.37 & 1.42 In a turnkey contract subcontractors and vendors are identical and one or both of these definitions should be deleted.

ARTICLE 2 - OBJECT OF THE CONTRACT

- Heading Delete "and cost of the project" as it will be seen that we recommen
deletion of such reference
- 2.5 This article should be deleted as the contract price is given and
broken down in Article 20. No other price information is relevant
in a turnkey contract.
- 2.6 Delete this Article which has no place under this heading. In any
event the Contractor has sole discretion regarding accounting in a
turnkey project.

ARTICLE 3 - SCOPE OF WORK

General

The contractors believe that Articles 3, 4 and 5 should be totally redrafted and re-written as two articles separating the responsibilities of the Contractor and the Purchaser. The present articles are unnecessarily complex, lengthy and repetitive.

- 3.1.4 There is no need to identify time critical and process critical items in a turnkey project other than as an internal Contractor exercise.
- 3.1.5 Delete. We would not expect to prequalify vendors for a turnkey project.
- 3.1.6 The itemisation of equipment must be subject in a turnkey project to the Contractor's freedom to change such lists without affecting his overall responsibilities.
- 3.2.2 The Contractor cannot bear the responsibility for the accuracy and suitability and adequacy of information supplied by the Purchaser and this reference must be deleted.
- 3.2.4 Delete the words "and satisfaction of all of the requirements" at the end as this is too imprecise.
- 3.3 Insert after "work" in the first line "within the battery limits" as the Contractor cannot be responsible for endless activities outside his original scope.

ARTICLE 4 - OBLIGATIONS OF THE CONTRACTOR

- 4.1 Delete last sentence as Contractor's performance should be a matter of definition and not inference.
- 4.4 This Article should be redrafted so that the Contractor's responsibility is limited to elements he can have ascertained himself before contract signature without any particular survey.
- The Purchaser should compile details of the applicable laws and warrant the completeness of such compilation as this activity is better done by the party operating within the country.
- The Contractor would wish to exclude from his liability sub-surface conditions which may not be visibly apparent.
- 4.5 The Contractor should be bound to supply only the technology he can have access to at the date of signature of the contract.
- 4.8 Delete second sentence. In a turnkey project the Contractor must have free choice of equipment.
- 4.9 Delete third and fourth sentences. The Contractor in a turnkey project should be free to supply whatever equipment he considers necessary without restriction and certainly without the approval of the Purchaser.
- 4.18 These responsibilities depend upon case to case definition and should be left for individual agreement rather than made mandatory.
- 4.22 As not all erection equipment is required until start-up and it is not feasible to hold all of it on the job site until then the Contractor should be allowed to remove his equipment when it is not required any longer and the Purchaser should guarantee the re-export of the equipment.
- 4.25 This period should be left blank and be subject to case by case agreement.
- 4.31 The last sentence should be deleted as it is meaningless.
- 4.34 The actual numbers, the duration of stay and the amount of space and assistance to be rendered should be defined case by case to avoid subsequent disagreement.
- 4.39 The engineers rights under this Article should be limited to emergency measures in the case of fire, accident or danger to health.

ARTICLE 5 - OBLIGATIONS OF PURCHASER

- 5.3 The site should be available to the Contractor at the signing of contract and not one month later as the Contractor is responsible even for soil investigation.
- 5.6 The words at the end of the Article reading "subject however to the right of the Purchaser pursuant to Article 37" should be deleted as the failure of the Purchaser to reply is not a matter for arbitration.
- 5.10 Insert after "provide" the words "free of charge". Also delete the words "after takeover". After takeover the provision of further services must be the subject of a separate agreement.
- 5.13 This clause should be worded in a similar manner as 4.34 and the same comment applies.

ARTICLE 6 - CO-OPERATION

- 6.7.5 & These clauses should be deleted as they are adequately covered by
6.7.6 the Terms of Payment Article.
- 6.8 In the fourth line insert after "meeting shall" the words "in accordance with the contract" as the subsequent items can only be reviewed in relation to the stipulations of the contract.
- 6.11 The term "all documents" is too general. The types of documents which Contractor shall provide should be specified in the Co-ordination procedure.
- 6.12 The period of thirty days is too long and should be no more than 15 days.
- 6.13 The meaning of this clause is a little obscure but would be improved if in the fifth line the words "a review within 30 days" is deleted and the words "a variation order within a reasonable period" is substituted.
- 6.15 If the review meetings in any way delay the Contractor his performance schedule should be appropriately modified. If this Article does not give the Contractor a right to such schedule modification he should have the right at his option to proceed with the work in accordance with his own evaluation of the matters in question.
- 6.16 In the second sentence documentation should be restricted to technical documentation and calculations should exclude process calculations.

- 7.13 It is assumed that the reference to Articles 30.1, 30.2 and 30.3 should read 7.8, 7.9 and 7.10. Purchaser's obligation with regard to Contractor's confidential information should be valid for a minimum of 10 years from final acceptance of the plant and in no event should the confidential information be used to duplicate the plant.
- 7.14 Add "any action by the Purchaser not approved in writing by the Contractor relieves the Contractor of his obligation under this Article".
- 7.17 Any patent indemnity undertaken by the Contractor would have to be subject to a limitation of liability equivalent to the liability undertaken by the Licensor.
- 7.18 This clause should be deleted as it is a repetition of 7.8.

ARTICLE 8 - EFFECTIVE DATE OF CONTRACT

- 8.1 It is sufficient to say that the contract will be executed in accordance with the applicable law without requiring witnessing or sealing which requirements vary from country to country.
- 8.1.3 The validity of any performance bond provided before the receipt of the advance payment must be contingent upon its receipt.
- 8.2 This should be deleted and replaced by a new 8.1.5 reading "The Purchaser has provided security for the remainder of the contract payments on terms acceptable to the Contractor".
- 8.3 This would be better situated in Article 1.

ARTICLE 9 - ASSIGNMENT OF CONTRACT

- 9.2 The Contractor should be entitled to assign his rights to financing or insurance institutions.
- 9.3 The Contractor should have the right to approve the assignment by the Purchaser such approval not being unreasonably withheld.
- 9.4 The Contractor should have the right to subcontract any part of the work in accordance with normal practice provided that he accepts full responsibility opposite the Purchaser.
- 9.5 Delete this Article. There should be no restriction upon the Contractor's right to subcontract and the Purchaser should have no right under a turnkey project to interfere in such subcontracting.

ARTICLE 10 - PROCUREMENT

General

The heading should be amended to read "PROCUREMENT OF SPARE PARTS" as this is the sole purpose of this Article.

The purpose of this Article needs rethinking. In a turnkey project the Contractor would normally include and be fully responsible for the inclusion of spare parts which he thinks are reasonable for a period of two years operation. In this case the whole of this Article is unnecessary. However if the Purchaser wishes to be responsible for the selection of his own spare parts then these should be left out of the contract price and supplied on a purely reimbursable basis both for material costs and home office services plus packing and freight.

There would be no point in offering any further comments on this Article until this decision was taken.

ARTICLE 11 - TIME OF ESSENCE

General

This concept is repugnant to contractors and its use is contrary to the recommendations of UNCITRAL.

The minimum basis upon which this Article could be acceptable would be if it did not increase the Contractor's liability in any way and this could be catered for by the addition of a new paragraph reading:

"11.5 Purchaser's exclusive remedy for Contractor's breach of any of its obligations under this Article is limited to the remedy specified in Article 27.1.1 and 27.1.2"

ARTICLE 12 - DELIVERY AND EXECUTION OF THE WORK

General

This Article to a large extent duplicates Articles 3 and 4 and it should be rationalised to avoid repetition.

- 12.1 Comments have already been made under Article 3 regarding the Contractor's rights with regard to the selection of equipment and these apply here too.
- 12.2.1 In a turnkey project the marking of the goods should be the prerogative of the Contractor and not the Purchaser.
- 12.2.3 If the Contractor is unable to import certain goods and materials into the Purchaser's country his local purchases should be subject to competitive prices, and the meeting of necessary technical standards and any restrictions regarding financing. If the Contractor is to take responsibility for the price of local items he should be provided prior to the time of submitting his proposal with a list of those goods which cannot be imported into the Purchaser's country.
- 12.2.7 The Contractor should be entitled to an extension of time as a result of any delay in granting such permits. In practice it would be preferable for the Purchaser to obtain them.
- 12.4.1 Delete "to the satisfaction of the Purchaser" at the end of the second sentence. This is a matter which should be under the Contractor's control.
- 12.4.2 The possibility of the Contractor repairing damaged items should be envisaged.
- 12.4.3 Delete the phrase in brackets. This again must be at the Contractor's discretion.
- 12.5.2 In the second sentence delete the words " the best and the most" and delete the end of this sentence after "Annexures IV and XXVIII" as this involves unwarranted interference by the Engineer.
- 12.6.3 Delete the words "to the satisfaction of the Engineer" at the end of the second sentence. Since the following sentence places final responsibility upon the Contractor the satisfaction of the Engineer has no practical meaning.
- 12.6.4 We would suggest that the work should be carried out in such a manner as not to interfere with traffic on any through road and we would want casual traffic especially footpath traffic routed round the job site.
- 12.6.5 Delete. We consider that the Contractor should not have to get approval for the erection of any temporary buildings.

- 12.6.6 Delete the words in brackets and also the last line.
- 12.6.7 It should be added that it is the Purchaser's obligation to provide drinking water, construction water and other utilities at a mutually agreed point within the Battery Limits.
- 12.6.8 The last sentence should be deleted as such circumstances are barely conceivable.
- 12.7.3 Delete. Contractor should be entitled to commence erection work without awaiting the Engineer's approval provided all express requirements for the civil engineering works established in the Annexures have been complied with.

ARTICLE 13 - SUPERVISION

- 13.3 Control over the work and workers competence is the responsibility of the Contractor. This clause should be entirely deleted or be revised to give the Engineer specific limited rights to remove only personnel who are violating local laws etcetera. He should have no right to determine the competence of Contractor's workers.
- 13.5 Add at the end "within the rights accorded to the Purchaser under the contract". The Purchaser cannot give his Engineer powers which he himself does not enjoy under the terms of the contract.
- 13.6 This clause needs to be reconsidered in the light of the appropriate powers to be accorded to the Engineer. It is worded too widely at the moment and there will be a limit on the amount of information and data concerning progress and execution of the work which will be provided to the Engineer. In the event that the Contractor believes that additional cost will result from complying with directions from the Engineer or providing assistance to the Engineer the Contractor should be entitled to submit a change order under Article 15.
- 13.9 Programmes should be agreed upon for visits to manufacturers workshops for the sake of mutual convenience and to allow the Contractor's inspectors to accompany the Purchaser's representative
- 13.12 Three years is too short a period and should correspond with the period agreed for exchange of technical information. Delete the last sentence which is an unacceptable restriction.
- 13.13 The Contractor's liability should be limited to the insurance proceeds available under Article 24.
- 13.14 This is another example of the Engineer's excessive powers and should be deleted.

ARTICLE 14 - INSPECTION

- 14.4 Delete. It is not necessary in a turnkey project to stipulate how the Contractor should proceed with his work.
- 14.5 Amend in second sentence words "when any equipment" to read "when equipment designated to be inspected". Not all equipment will be inspected and it is a waste of time giving notice for those items which will not.
- 14.6 We would not expect the Purchaser to be the sole judge as to whether any service or workmanship is defective and the Purchaser should not have unilateral right of rejection without giving proper reasons which are acceptable to the Contractor.
- 14.9 This clause should be revised to indicate that the Contractor's inspection and advice would not relieve the Purchaser from his sole responsibility for the correctness of equipment supplied by the Purchaser and its performance.
- 14.12 & 14.13 The Contractor should be entitled to time adjustments and additional costs which may be required due to the Purchaser's inspection.
- 14.14 Unless such instruments are in the possession of the Contractor their provision should be at extra cost to the Purchaser.

ARTICLE 15 - VARIATIONS

General

This Article should be amended to include a variety of other circumstances in which the Contractor should be entitled to claim variation orders including changes in laws, regulations or tax provisions, force majeure, modifications in the basic data, costs occasioned by Purchaser's delay or non-performance of any of his obligations and other events beyond the Contractor's control which could influence the execution of the project.

- 15.1 This should be amended to mention that changes directed by the Purchaser should be consistent with the purpose of the project and should be limited to 10% of the contract price.

In case of a dispute about the cost of the change the cost should not be unilaterally determined but should be established by objective standards. Pending the settlement of such a dispute it does not seem to be in the Purchaser's best interests to require the Contractor to proceed with the execution of the change. Prior agreement on price, terms of payment and impact on other contract provisions particularly on guarantees should be a condition for proceeding.

- 15.3 These events fall within the existing obligations of the Contractor and do not require the issue of change orders.

- 15.4 Delete the second sentence as defects in the works should not be the subject of variation orders.

- 15.5 This clause should be deleted as the kind of changes which are envisaged should be deleted from this Article and those remaining are ones which could justify extra costs.

- 15.6 Delete the last sentence as this gives the Purchaser unwarranted arbitrary powers.

- 15.7 Delete this clause for the reasons given under 15.5.

- 15.10 The Contractor should not be obliged to carry out any variations until a decision is taken for the reasons mentioned under 15.1.

- 15.13 It would be preferable to delete this clause and provide a contingency sum under the contract price which the Purchaser and the Contractor could use for this and other purposes.

- 15.14 Delete this clause as it is superfluous.

ARTICLE 16 - TRAINING

16.2 The training required by this clause should include initial training only and any retraining required should be under a strictly reimbursable basis.

There should be a new Article stipulating that travel and living expenses of the Purchaser's personnel should be for the Purchaser's account.

ARTICLE 17 - MANAGEMENT SERVICES

The contractors would recommend the deletion of this Article as the services mentioned are usually not included within the scope of a turnkey contract and should in any case be optional. They would be better covered by a separate agreement which would set forth in greater detail the obligations of the parties. This could be mentioned in the guidelines and if necessary a draft of such an agreement could be appended.

ARTICLE 18 - COMPLETION OF WORKS

- 18.1 Delete "notwithstanding the contractual time schedules provided herein" as this statement has little meaning.
- 18.2 Delete the second sentence since it is normal for rectification to occur before or after Provisional Acceptance without prejudice to actual completion.
- 18.5 Delete the last sentence as the Contractor's right for payment should be fully covered under Article 20.
- 18.7 Delete the last sentence as well as the last sentence of 18.4 referred to as a signed report must mean what it says and any reservations thereon should be written in to the report.
- 18.12 & 18.13 Delete all words following "Article 26" in both cases as the further references are unnecessary.
- 18.14.2 The Contractor already has a warranty obligation without this being a condition for acceptance and this clause should be deleted.
- 18.14.3 As-built drawings usually take a long while to prepare and should not be a condition for acceptance.
- 18.14.4 Add at the end of the sentence the words "except minor works".
- 18.14.5 These are both conditions for mechanical completion not
& 18.14.6 Provisional Acceptance and as they are covered elsewhere they should be deleted.
- 18.14.7.2 Insert after "if for any reason" in the first line the words "due to the Contractor".
- 18.14.8 Management services should be optional as mentioned under Article 17 and this clause should therefore be deleted.
- 18.15 Delete. The actual completion of work should not depend upon any declaration of the Purchaser.
- 18.16 At the end of the third line the phrase "from his obligations" should be changed into "from any remaining obligations". The last three lines should be deleted for the reasons given under Article 18.7.
- 18.18.2 Delete the words "inter alia" in the last line as this is too imprecise a statement.
- 18.20 Add at the end "which defects have not been removed and which modifications have not been carried out".
- 18.21 Delete this clause. It is superfluous.

ARTICLE 19 - EXTENSION OF TIME

General

This Article needs to recognise that time schedules should be extended to reflect the impact of delays caused by the Purchaser (including payments and approvals) and any other parties employed by the Purchaser or outside the control of the Contractor.

19.4 Delete the words "accepted by the Purchaser" in lines four and five.

ARTICLE 20 - CONTRACT PRICE AND TERMS OF PAYMENT

General

It should be recognised that Articles covering contract price and terms of payment are highly individual to each project and are a function of a great many factors not least of all the method of financing which will substantially affect the content and shape of these Articles. Our comments are therefore based upon the fact that model conditions can only indicate the principles involved in this area and not the precise detail.

- 20.1.1 Words such as "final and conclusive" should be avoided as variations are provided for in this contract and a variety of possibilities which would cause an amendment to the price could be envisaged. There should be a reference here also to the fact that the price does not include taxes payable outside the Contractor's country.
- 20.1.2 There should be a reference to Article 9 which can also modify the price. Delete the last sentence as this will not tie in with the way we have proposed that Article 15 should be modified.
- 20.2 to 20.8 It will probably be necessary to split down these figures further to differentiate between work done in the Purchaser's country and work done outside as different currencies are likely to be used in each case.
- 20.4 The reference "including road, rail and telephone connections" will probably be omitted in most cases.
- 20.6.2 This would not normally be separated from 20.6.1 unless it were to be the subject of a separate agreement in which case it would not appear here.
- 20.9 Escalation should be envisaged in certain circumstances particularly for local work. This is not at all inconsistent with a turnkey lump sum type of contract.
- 20.10 to 20.16 The guidelines should make it clear that these percentages are indicative only and are subject to individual negotiation. In general the retention percentages are much greater than those normally found in contracts of this type which will probably be limited to 5 per cent after Provisional Acceptance.
- 20.11.2 Delete the proviso as this should be covered under the milestone provisions.
- 20.12.3 Delete "as reported and approved by the Engineer". The evidence for payment will be actual timesheets.
- 20.13.3 Delete "and certified by the Engineer".
- 20.13.5 See comment under Article 1.18.
- 20.14.1 Payments for these services should be made according to actual timesheets and not at certain stages of activity.
- 20.14.2 This should be deleted along with 20.6.2.

- 20.15 We presume the reference to Article 20.5 should be Article 20.7.
- 20.16.1 This instalment should fall due on the receipt of the said list by the Purchaser.
- 20.16.3 There is no justification to connect payment for spare parts with completion of guarantee tests and therefore the second instalment under 20.16.2 should amount to 90%.
- 20.17 Delete as this is an unnecessary cross-reference to Article 27.
- 20.18 Delete this clause also as it is properly catered for under Article 21.
- 20.19 If payment is to be made entirely out of letters of credit they should also be confirmed in the Contractor's country but it is more than likely that other financing sources will be used and would have to be taken care of in drafting this part of the Article.

Since all payments contemplated under this Article require the Contractor to obtain a certificate from the Purchaser verifying satisfactory performance, delivery, receipt of the plans etcetera we suggest that the entire question of Purchaser's approval is subject to additional discussion. As a general principle contractors prefer payment against actual events such as engineering milestones or equipment deliveries or monthly timesheets rather than the Purchaser's discretion. This entire section should be redrafted accordingly.

- 20.20.1 See comment under Article 1.18
- & 20.20.2
- 20.20.3 Delete the word "satisfactory" from the third line.
- 20.21 Delete last sentence. All charges incurred in connection with the opening and the confirmation of letters of credit should be paid by the Purchaser.
- 20.22 The periods should be deleted and left for individual negotiation.
- 20.23 Delete all of this clause after the end of the seventh line. The Contractor's rights to payment can in no event be subject to putting up further bank guarantees. It follows that Article 22.3 should also be deleted.
- 20.24 The period should be left blank for individual negotiation.
- 20.25 In the second line after the word "shall" insert the word "not".
- 20.26 The period for payment is too long and should not exceed 30 days.
- 20.27 Delete this Article as payment should in all cases be clearly due and not the subject of dispute or the arbitrary opinion of the Purchaser.
- 20.28 Delete "subject to national laws in the Purchaser's country". In the event of any taxes being levied they should be covered by an indemnity from the Purchaser.

20.30.1 Add after "defects" in the fifth line "which are not remedied".

20.31 The period should be left for individual negotiation. In lines three and four the "reasons attributable solely to the Purchaser" should be substituted by "reasons not attributable to the Contractor".

20.32 Delete as this is an unnecessary cross-reference.

20.33 Delete. There is no need for this clause.

A clause requiring Purchaser to pay interest on overdue payments needs to be included.

ARTICLE 21 - PERFORMANCE BONDS

General

We consider that the ICC Uniform Rules for Contract Guarantees should apply to the issue of any bonds or guarantees.

21.1 The performance bond should not be submitted upon execution of the contract but only upon expiration of the advance payment bond for either engineering services or supply of equipment as a pre-condition for Purchaser's obligations to return such advance payment bonds to the Contractor.

The bank or bonding institution should not be required to be located in the Purchaser's country.

Performance bonds should be reduced upon Provisional Acceptance to 50% of its value as a considerable part of Contractor's obligations have terminated at that time.

21.2 The advance payment bond should be reduced automatically corresponding to the engineering services rendered and equipment delivered by the Contractor.

21.3 There should be no need to have said bank guarantee confirmed by a bank in the Purchaser's country.

ARTICLE 22 - INDEMNIFICATION

- 22.1 This clause should be rewritten to avoid duplication of patent indemnities referred to elsewhere and might better be situated under the Insurance Article.

- 22.2 This clause should not be limited only to defects in title but should be revised to require Purchaser to indemnify for all losses arising out of all of his activities under the contract. This again might be absorbed into the Insurance or Liabilities Articles.

ARTICLE 23 - PROJECT ACCOUNTING AND AUDIT

This Article should be completed deleted as there is no need for any reference to project accounting and audit in a turnkey lump sum contract as this activity is strictly an internal function of a Contractor.

ARTICLE 24 - INSURANCE

- 24.1 It is normal for construction insurances to run only from commencement of work on site and to end on Provisional Acceptance with an extension during the warranty period to cover the Contractor's presence on site for rectification purposes. At Provisional Acceptance the Purchaser would normally take out full operating insurances.
- 24.1.1 This clause should be specific in its reference to Article 24.5 and therefore exclude the words "including those". Delete the last two lines as they add nothing to the meaning of the clause.
- 24.1.2 Delete. Such insurances are entirely at the Contractor's discretion.
- 24.2 Delete. This conflicts with 24.3 which only requires authenticated copies and not originals and is therefore quite superfluous.
- 24.3 This clause should only cover those policies in which the Purchaser has an insurable interest and this will therefore not cover all of the policies listed in 24.5.
- 24.4.2 In the event that the Contractor fails to take out insurance policies he should not be asked to accept liabilities greater than would have been the case had he done so. Therefore this clause should be deleted.
- 24.5 It would be normal to include in the site insurance package a general liability policy covering personal injury and property damage to third parties.
- 24.5.1 All subcontractors should be included as insured parties.
- 24.5.2 Delete. This should be taken out by the Purchaser if it is available at all.
- 24.5.3 This should be included under 24.5.1 up to Provisional Acceptance and would be insured at the Purchaser's discretion thereafter.
- 24.5.4 The Contractor would not normally take out a separate policy to cover a particular project but would include this risk under his corporate policy with whatever conditions and limits applied thereto.
- 24.6 It is of course questionable whether such insurance can be obtained. If it is it should be clear that the consequential loss referred to is not a Contractor liability. Since this insurance is to be obtained, if at all, by mutual agreement the price should be for the Purchaser's account and not included in the lump sum price.
- 24.7 All policies in the name of the Purchaser should include the Contractor and his subcontractors as insured parties with waiver of subrogation.
- 24.7.3 Delete the last two lines as the beneficiary of any policies will be the respective party insured making the claim.

- 24.8 Delete. The rights of redress by the Purchaser are already covered by 24.4.
- 24.9 Delete. Under a turnkey project the Contractor is obliged to modify, rectify and replace every item not working properly or damaged at his own expense and will therefore have the right of using insurance proceeds for this purpose.

ARTICLE 25 - GUARANTEE OF WORKMANSHIP AND MATERIALS

This Article says nothing that is not already said elsewhere and is best deleted and combined with Articles 28 and 29.

ARTICLE 26 - GUARANTEES AND PERFORMANCE GUARANTEE TESTS

General

Whilst we propose to comment in some detail on Articles 26 to 30 we feel that the contract would be much simplified by combining them into two articles, one related to guarantees and tests and the other to liabilities.

- 26.1 Delete. This is quite superfluous and is no more than a repetition of the heading.
- 26.2 This clause should be much more precise. The first sentence could be revised to read "The Plant supplied by the Contractor shall be capable of meeting the requirements stated below in 26.2.1 through 26.2.7, all of which are hereby guaranteed by the Contractor . . .".
- 26.2.2 The quality of product should always be conditional upon the availability of specification grade feedstock.
- 26.3.1 Delete 26.3.1.1, 26.3.1.2, 26.13.1.4, 26.3.1.5 and 26.3.1.6. These are not normally and should not be absolute guarantees.
- 26.3.2 This clause should be modified to include the items deleted from 26.3.1 and all further references to absolute and penaltiable guarantees should be amended accordingly.
- 26.3.3 Delete this Article which is not in the right place and which conflicts with Article 26.8. Sustained steady operation can be demonstrated over a shorter period of time. We would also wish to clarify that the design and procurement is based upon an expected stream factor of 330 days and that this provision does not constitute an annual production guarantee.
- 26.4 This further defines the definition in Article 1.2 and is confusing. It would be better rewritten as follows "Absolute guarantees shall be defined as those guarantees which must be met to satisfy the conditions expressed or referred to more particularly in this Article".
- 26.5 This again conflicts with Article 1.27 and is confusing. A better wording would be "Penaltiable guarantees shall be defined as those guarantees which, if not met, may be at the Contractor's option, compensated by the modification of a plant in order to meet the said guarantees or by the payment of liquidated damages as specified in Article 27".
- 26.6, 26.7 & 26.8 We are not offering specific comments on these clauses as we believe that they should not appear in this amount of detail in model conditions and in any event are subject to individual negotiation case by case.
- 26.9 The instruments used in the measurement of plant capacity and consumption shall be those instruments which are available at the site.
- 26.10.1 Periods should be left blank and be for individual agreement. In the fifth and sixth lines delete "and/or mistakes and errors in the contractual specifications and instructions". These terms are vague and meaningless.

26.10.3 Delete the last sentence as the Purchaser should not have the right to operate the plant at this stage.

26.11 Leave the period blank.

In line seven the PURchaser's right to stop payment should be restricted to payments for delegated staff only.

26.12 & Leave periods blank for individual negotiation.
26.13

26.13 Delete words in brackets in second and third lines as this is repetitious.

26.14 In line three "reasons attributable solely to tne Purchaser" should be changed for "reasons not attributable to the Contractor". The period should be left blank for individual negotiation. Delete the last sentence as arbitration applies to any dispute wherever it arises in the contract.

26.15 Delete the first sentence as this is repetitious.

26.16 The Contractor should not be obliged to undertake tests but to assist the Purchaser in undertaking tests.

ARTICLE 27 - LIQUIDATED DAMAGES

- 27.1 Delete "of the several responsibilities under provisions of Articles 12, 18, 25, 26 and 28 and as detailed elsewhere in the contract" as this is unnecessary repetition.
- Liquidated damages formula should be provided for every time schedule stated in the contract. Furthermore all the liquidated damages should be subject to the limitations of Article 30.5.
- 27.1.1 Delete the words "except where any delay is caused by any act or omission on the part of the Purchaser". Other parts of the contract define what constitutes a delay and this is not the only exception.
- 27.5 Delete. The whole point of having specific liquidated damages is to avoid vague liabilities such as this.
- 27.6 The contractors object to the concept of unilateral set off. Furthermore it should be clear that the payment of liquidated damages for failure to attain penaltiabile guarantees relieves the Contractor from the obligation of attaining these guarantees.

ARTICLE 28 - WARRANTIES

General

We have already commented under Article 25 that much wording in this contract is repetitious and this Article should be rewritten consistent with other references.

- 28.3 The period of 30 months is too long and should be changed to 18 months. In the third sentence "reasons only attributable to the Purchaser" should be changed to "reasons not attributable to the Contractor".
- 28.4 Delete in the first sentence the words "or the date of final acceptance by the Purchaser whichever is the later".
- In line thirteen delete "in a manner satisfactory to the Purchaser".
- 28.6 The warranty period for repaired parts should not exceed 12 months from the expiration of the original guarantee period.
- 28.8.2 Delete. This is much too vague and has been said better elsewhere.
- 28.9 Delete the words "or twelve months after takeover (whichever is the later) of the plant by the Purchaser". This has already been covered.
- 28.10 Should the Purchaser proceed with any remedial measures without the Contractor's approval any remaining warranties would be voided.

ARTICLE 29 - RECTIFICATION

General

The procedures set forth in this Article for rectification and modification of the plant are not all required since these activities prior to the Provisional Acceptance are the responsibility of the Contractor and can be done at his own discretion. Thus all provisions relating to the period prior to Provisional Acceptance as well as the provisions which are duplicated in Article 28 could be deleted and the remaining provisions should be confined with proper editing into one Article with Articles 25 and 28. We therefore do not propose to comment in detail upon this Article until we see a redraft. Hopefully in the course of that exercise Article 29.10 which is monstrous in length and complexity would be drastically changed.

ARTICLE 20 - LIABILITIES

30.1 & Delete. These clauses simply repeat things that have been better
30.2 said elsewhere.

30.3 The Contractor's liability for damage to Purchaser's property or
equipment should be limited to insurance proceeds received by the
Contractor.

30.4 Delete. Any compensation from Contractor's insurance claims should
be to his benefit as already mentioned under Article 24.

30.5 The contractors would recommend a maximum liability of 5 per cent.
This should be related to the contract price and not to the total
project cost.

Delete all wording after "unlimited liability" to the end of the
clause and substitute "for his obligation to modify and to rectify
the plant as far as stipulated in the contract".

30.6 This clause would be better worded as follows "The Contractor shall
not be liable, in any event, whether under the contract or
otherwise for loss of anticipated profits or for any special,
indirect or consequential loss or damage arising from any cause".

30.7 The Purchaser should justify his requirement for make good and
prove that the Contractor has not fulfilled his obligations under
the contract and is not willing to do so.

30.8 Delete. This is gratuitous.

30.9 The concept of set off is repugnant to the contractors.

30.10 It is difficult to grasp the meaning of this clause. If it has
anything important to say it should be rewritten in plain English.

ARTICLE 31 - TAXES

31.2 Delete the words "subject to national laws in the Purchaser's country".

ARTICLE 32 - SUSPENSION OF WORK

- 32.4 The last line of this Article should be modified to read as follows "during which the execution of the work or part of the work was suspended and the Contractor shall be reimbursed for any additional cost incurred by him as a result of the suspension".
- 32.5 The last part of this subclause should be modified to read as follows "In accordance with the terms and conditions of this contract, provided however that the time schedule will be extended accordingly and that the Contractor has been reimbursed for his additional costs resulting from the suspension".
- 32.6 After a suspension of more than 180 days the Contractor should have the right to refuse to recommence the work without resort to arbitration and have the contract terminated.
- 32.8 Any payments to be made under this Article should be covered by Article 20.

ARTICLE 33 - TERMINATION

- 33.1 Both parties should have the right to terminate if they are subject to circumstances beyond their control including those covered by Article 34.
- 33.3 If the Purchaser chooses to terminate the Contractor should be entitled to compensation for loss of profit or a certain percentage of the amount of work still to be done.
- 33.5 The Purchaser's rights under this clause should be limited to those cases where there has been a breach of the Contractor's obligations and for which the Contractor has received the full value.
- 33.5.1 The validity of the process licence and the submission of the basic engineering documents should be dependent upon a mutual agreement from case to case taking into consideration the stage of implementation upon the termination of contract, as the process licensor or the Contractor may not be expected to grant a complete process licence as intended in case of the termination of the contract in a rather early stage of implementation .
- 33.6 For the words "the courts of competent jurisdiction" in the last line replace the words "arbitration as per Article 37".
- 33.7.1 & Delete. These are not substantial causes for termination.
33.7.5
- 33.8 Delete the last three lines as no exception to the arbitration procedure is acceptable.
- 33.9 This is too discretionary. The normal mechanism on termination of the contract is that the Contractor on the one hand is entitled to receive payments for all services and supplies fulfilled and the Purchaser is entitled to have the plant completed by third parties or by himself and the Contractor is obliged to pay to the Purchaser the additional cost i.e. any cost exceeding the contract price which may be required to complete the works.
- 33.10 Delete. The fact of termination and settlement as described in this Article *must* relieve the Contractor of any further obligations under the contract.
- 33.11 This clause is only acceptable in the case of bankruptcy. In the case of the Purchaser selling the equipment the know-how of the Contractor must be protected so that at least the selling of proprietary equipment should be admissible only after mutual agreement or at least under the provision that the Contractor's know-how will be properly protected.
- 33.12 Delete. Regardless of the causes of termination the Purchaser should have the right to obtain data and documents from the Contractor only to the extent that he has paid for such items.

ARTICLE 34 - FORCE MAJEURE

- 34.1 The exclusions from force majeure of strikes etcetera which are within the power of the party affected should be deleted.
- 34.2 15 days is more normal than 10.
- 34.5 After a nine month period of force majeure either party should have the right to terminate without the need to resort to arbitration.
- 34.7 Delete the first sentence which has no meaning.

ARTICLE 35 - LANGUAGE

No comments

ARTICLE 36 - APPLICABLE LAWS

- 35.1 Delete all words after "(neutral country)".
- 36.2 With regard to the codes mentioned in the first sentence only those specified in the Annexures should be applicable. The phrase within brackets in lines five and six should be deleted.
- 36.2.2 After "price" in the fourth line insert "and time schedule".

ARTICLE 37 - ARBITRATION

This Article is unnecessarily long and it would be much simpler to include the standard provision recommended by the International Chamber of Commerce reading as follows:

" All disputes arising in connection with the present contract shall be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. "

37.7 Pending resolution of the dispute by arbitration further performance of the work should be conditional upon agreement of the parties thereto. It does not seem wise to oblige the Contractor to continue performance of disputed obligations.

37.9 The place of arbitration should be in a neutral country.

ARTICLE 38 - GENERAL PROVISIONS

No comments

ARTICLE 39 - NOTICES AND APPROVALS

39.1.2 Delete. The deemed service upon ten days is not an acceptable standard since depending on the countries involved the mail service is not always so reliable.

ARTICLE 40 - DISCLOSURES

40.2 Delete. The Contractor will probably have a long-standing agent in the Purchaser's country and neither the Contractor nor the agent may be willing to reveal their internal relations or the amount of fee that is being paid.

