



Compiler guidance note

Component document: C1.2 - Contract Data

Function and broad outline of contents

Identifies which standard conditions of contract are applicable, and together with contract specific data, establishes the risks, liabilities and obligations of the contracting parties and the procedures for the administration of the contract.

Notes

Sub-clause 4.4.4.1 of the Standard for Uniformity in Construction Procurement requires that the contract data in respect of prime or main contracts must reference one of the following standard industry forms of contract unless the publishers of such forms of contract indicate that such a form of contract is not suited for the intended application:

- a) engineering and construction works contract;
 - i) General Conditions of Contract for Construction Works;
 - ii) Conditions of Contract for Construction, Conditions of Contract for Plant and Design-Build, Conditions of Contract for FIDIC EPC/Turnkey Projects or Short Form of Contract;
 - iii) JBCC series 2000 Principal Building Agreement or Minor Works Agreement; or
 - iv) NEC3 Engineering and Construction Short Contract or NEC3 Engineering and Construction Contract.
- b) services contract (professional);
 - i) CIDB Standard Professional Services Contract; or
 - ii) NEC3 Professional Services Contract.
- c) services contract (facilities);
 - i) NEC3 Term Services Contract
 - ii) CIDB General Conditions of Service
- d) supply contract;
 - i) CIDB General conditions of purchase;
 - ii) CIDB Supply of Goods (Short Contract);
 - iii) CIDB Contract for the Supply and Delivery of Goods; or
 - iv) CIDB The Supply Contract.

Sub-clause 4.4.4.2 of the Standard requires that the aforementioned standard industry forms of contract be used with **minimal project specific variations and additions which do not change their intended usage.**

The abovementioned standard forms of contract need not be issued with a tender or included in the final contract document, but should be referred to as being part of the contract data.

Sub-clause 4.4.4.3 states that *guarantees of an insurance company or bank required in engineering and construction works contracts shall not substantially differ from the samples provided by the drafters of the forms of contract listed in 4.4.4.1 a). Such guarantees shall not normally exceed 10% of the contract price or, in the case of a variable guarantee, 12,5%.*

It should be noted that each of the four recommended forms of contract (JBCC, FIDIC, GCC and NEC3) has a form of guarantee associated with it, which represent a best fit for each form of contract. Furthermore some forms of contract provide for a range of guarantees, including parent guarantees. This approach permits the use of these in large and complex contracts.

Commentary:

- 1 The contract data must:
 - a) identify the applicable standard of contract and set out all the contract-specific variables, data schedules, appendices, etc., that the parties are required to provide during the tender process;
 - b) be divided into two parts; the first part being the data provided by the employer and the second part the data provided by the contractor; and
 - c) not provide for variations and additions which change the intended usage of the standard form of contract that is identified.

- 2 The contract data should contain provisions for:
 - a) price adjustments, should the contract period exceed one year, and
 - b) interest, at the prime interest rate, on monies due to the contractor, which are not paid within 30 days of being due, to deter late payment.

- 3 Contracts involving reimbursements on the basis of time and costs or on the basis of cost plus a fee for profit and overheads must be structured such that:
 - a) expenditure can be readily audited,
 - b) reimbursable costs are at market or competitively tendered prices,
 - c) the end costs of the contract can be continuously tracked and reported on at regular intervals, and
 - d) within a short time after the completion of the contract, the final contract amount is known and can be settled.

- 4 Requirements for delivery periods that are incorporated into procurement documents shall be consistent with the organization's reasonable needs and shall take into account factors such as the complexity of the intended procurement and realistic time frames for completing the work.

- 5 The Construction Procurement Best Practices published by the CIDB in government gazette no 24627 of 9 June 2004 states the following:

The procedure whereby disputes are settled by arbitration or court proceedings is both costly and time consuming. These procedures are not necessarily in the interests of the parties, or appropriate. The delayed resolution of disputes impacts negatively on project outcomes for all participants. Most standard forms of contract make provision for the settlement of disputes by a number of means including expert determination, mediation, conciliation and adjudication. Each of these has its place in the course of dispute resolution.

Adjudication has become the preferred international procedure for dispute resolution. This rapid and relatively inexpensive procedure, which is conducted by a third party intermediary within the contract period, results in a decision that is binding on the parties in dispute. The decision is final, unless and until it is reviewed by either arbitration or court proceedings. The strength of adjudication lies in the contractual commitment by the parties to engage a specific, named (independent) person or persons who will become and remain acquainted with the project and are therefore enabled to make an expeditious finding. Furthermore, the terms and procedures for the process of adjudication are agreed and detailed in the contract itself. This results in an informed, transparent, relatively speedy decision.

CIDB Construction Procurement Best Practice Guideline C3, *Adjudication*, provides an overview of what adjudication is, presents the principles underpinning adjudication, reviews the provisions for adjudication in standard forms of contract (NEC, FIDIC and CIDB), outlines an approach for the selection and use of adjudicators, and provides sample clauses and proforma agreements to be included in procurement documents. The sample Contract Data incorporate the guidance provided in this practice guide.

SANS 294, *Construction Procurement Processes, Procedures and Methods*, provides a mediation procedure i.e. a form of dispute resolution involving a third-party intermediary that is intended to produce an agreement or conciliation between the parties to a contract. Where the CIDB listed forms of contract do not contain a mediation procedure, it is recommended that this procedures be adopted as reflected in the sample Contract Data.

A fair and equitable form of contract contains a dispute procedure to resolve disputes during the contract period. As a result, each contract must contain either a mediation or adjudication procedure to resolve

disputes during the contract period, and either a litigation or arbitration procedure to finally settle disputes, should it be necessary.

Regulation 21(e) of the Local Government: Municipal Finance Management Act, 2003, Municipal Supply Chain Management Regulations stipulate that disputes must *be settled by means of mutual consultation, mediation (with or without legal representation), or, when unsuccessful, in a South African court of law.* This regulation in effect requires that alternative means should be pursued before settling a dispute in court. It should be noted that arbitration is a means of settling a dispute other than through court and courts, in terms of the Arbitration Act of 1965 (Act 42 of 1965), may under certain circumstances, set aside an award of an arbitrator. Thus arbitration is still subject to the courts.

- 6 The GCC, NEC3 and FIDIC forms of Contract, which are applicable to both engineering and building works, can readily be aligned with the Standard.
- SAICE converted GCC 1990 and the COLTO General Conditions of Contract into GCC 2004. This version of GCC fully aligns with the Standard in terms of terminology, the process of offer and acceptance and the manner in which the selected subcontractors are to be appointed.
 - The NEC3, whose terminology aligns well with the Standard, has not been structured around any particular process of offer and acceptance or structure of procurement documents. Accordingly, the NEC3 conditions of contract (and conditions of subcontract) satisfy all requirements of the Standard without amendment.
 - The alignment between the FIDIC documents and the Standard is reasonable, despite the forms of contract being structured around a different process of offer and acceptance. Nevertheless, some minor amendments to the terminology and the embedded process of offer and acceptance are necessary to achieve alignment with the Standard.

The JBCC Series 2000 forms of contract (edition 5.0 of July 2007), which are applicable to building works, can be readily aligned with the Standard. (The early editions of JBCC required a number of modifications to align with the Standard and contained state provisions. Edition 5.0 contains no state provision – it allows users to make choices between alternatives in the contract data.)

- 7 SAFCEC recommends the following coefficients when using the price adjustment schedule contained in GCC 2004 where bitumen is not treated as a special material and adjusted on the basis of an increase or decrease in cost:

No.	Work Category	Labour	Plant	Materials	Fuel
1	Bulk Earthworks	0.10	0.65	0.05	0.20
2	Earthworks (with culverts and drainage)	0.15	0.50	0.20	0.15
3	New Road Construction:				
	National Provincial Roads	0.15	0.35	0.35	0.15
	Urban Roads	0.25	0.15	0.55	0.05
4	Township Roads and Services	0.20	0.25	0.45	0.10
5	Rehabilitation/Resurfacing Works	0.15	0.25	0.50	0.10
6	Routine Maintenance Works	0.45	0.30	0.15	0.10
7	Concrete Works (major structures)	0.30	0.20	0.45	0.05
8	Concrete Works (reservoirs and other general civil engineering works)	0.25	0.15	0.55	0.05
9	Water and Sewer Reticulation	0.15	0.20	0.55	0.10

SAFCEC strongly recommends that bitumen be treated as a “special material”, in which case the coefficients should be as follows:

No.	Work Category	Labour	Plant	Materials	Fuel
3	New Road Construction:				
3.1	National Provincial Roads	0.20	0.40	0.25	0.15
3.2	Urban Roads	0.30	0.30	0.35	0.05
4	Township Roads and Services	0.21	0.27	0.42	0.10
5	Rehabilitation/Resurfacing Works	0.20	0.35	0.35	0.10
6	Routine Maintenance Works	0.48	0.37	0.05	0.10

The coefficient for "Fuel" may need to be revised from time to time, as it has a tendency to increase out of proportion to the other factors in the CPA Formula.

- 8 Where there is a major component in a contract, such as cement in the construction of a concrete road or a large dam or reinforcing steel in the construction of a large concrete structure, then consideration should be given to treating these components as "special materials." This is consistent with the provisions of the "General Conditions of Contract for Construction Works" (GCC 2004). This may also apply to major materials for specialist Subcontractors.