

**SOUTH AFRICAN ROAD FEDERATION**  
**SYMPOSIUM ON THE PREPARATION OF CONTRACT DOCUMENTATION**  
**AND ADMINISTRATION OF CIVIL ENGINEERING CONTRACTS**  
**CHAPTER 5: THE CONTRACT DATA (BY THE EMPLOYER)**

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## **1. INTRODUCTION**

The General Conditions of Contract, which are of general application, attempt to cover as many of the issues relating to a contract as possible. It is however, not possible to cover every requirement which may arise in meeting the specific requirements of contracts. Nor do the General Conditions of Contract necessarily conform to the procedures laid down by the various Employers who make use of them.

The options that are available are therefore:

- i) To re-write the General Conditions of Contract so that they embody all requirements for the particular contract i.e. a new set of General Conditions of Contract.
- ii) Introduce in the Contract Data (previously known as Special Conditions of Contract) carefully drafted amendments which either amplify or modify the provisions of individual clauses of the GCC.

In the latter case the GCC will be incorporated into the contract by reference and the amending text introduced by the Contract Data will form Part 1 of the Contract Data – Data Provided by the Employer.

It should be noted that the term 'Contract Data' is used when working with GCC 2010 or 2015, whereas when using FIDIC I 1999 the term is 'Particular Conditions'.

To demonstrate the potential problems that may arise during the drafting of tender documents we shall, during this course, use both expressions as appropriate in the context of any discussion that may take place.

## **2. STATUS OF THE CONTRACT DATA OR PARTICULAR CONDITIONS**

As the Contract Data (or Particular Conditions) pertain to a specific contract the provisions of the Contract Data will always prevail over the General Conditions of Contract. Should there be a conflict between the two the Contract Data will always take precedence. Care is therefore required in the drafting of the amendments to the GCC being introduced in the Contract Data to avoid any conflicts.

### **3. SCOPE OF THE CONTRACT DATA (PARTICULAR CONDITIONS)**

The amendments introduced by the Contract Data can, if so required, vary every single clause in the GCC to a greater or lesser extent. The rights and responsibilities of the parties to the contract can be substantially amended through the Contract Data and increased or diminished obligations can be imposed on particularly the Contractor. A natural consequence that the Employer must expect as a result of changing the obligations is the potential increase in the tender sums received. Should a tenderer perceive that the terms of the Contract are more onerous, he will of necessity have to allow for this by adjusting his pricing for the additional risk that he considers that he may be required to manage.

It is therefore wise to limit the scope of the Contract Data as much as possible and only to make such variations as are necessary for the particular contract in question. The temptation to vary the clauses just because the wording of the GCC is not to the liking of one or the other party to the contract must be resisted as far as possible.

The GCC (2010 and 2015) also require certain matters to be dealt with in Contract Data and if these matters are not attended to during the drafting of the tender document this may result in the potential for ambiguous interpretations and/or the development of disputes between the parties.

### **4. TYPES OF AMENDMENTS INTRODUCED IN CONTRACT DATA (GCC 2010 and 2015)**

Examples of various clauses in GCC 2010 and 2015 where amendments may be required to be introduced through the Contract Data are provided below as a guide. Bear in mind that the extent to which the General Conditions of Contract are amended can have a significant effect upon the pricing of the tender and very often Employers will need professional guidance from the Consulting Engineer in this regard.

#### **Definitions, Interpretations and General Provisions (Clause 1 in 2010 and 2015)**

- The General Conditions of Contract require the Contract Data to define who the Employer is and who the Engineer is. In GCC 2015 the Engineer is known as the "Employer's Agent," and the Engineer's Representative is known as the "Employer's Agent's Representative." Other definitions can be added where necessary.
- The Defects Liability Period, the Due Completion Date and addresses for serving contractual notices are also to be identified in the Contract Data.

- In international contracts it would be necessary to define the ruling language of the Contract and even the law to which the Contract will be subject. Maybe it is even necessary routinely in South African contracts.

#### **Employer's Agent and Employer's Agent's Representative (Clause 3 in 2015)**

#### **Engineer and Engineer's Representative (Clause 3 in 2010)**

- If the duties of the Employer's Agent (Engineer) in the Contract have in anyway been limited in the agreement between the Employer and the Employer's Agent the Contractor is entitled to this information and a special clause should be entered to explain what these limitations are. A typical limitation would be restricting to a predetermined amount the value of any variation that the Employer's Agent may instruct without the prior approval of the Employer.

#### **Security (Clause 6.2 in 2010 and 2015)**

- Requirements for sureties may differ depending upon the Employer or authority concerned. In some cases the surety is not released until the end of the Defects Liability Period. Again these matters are to be covered in the Contract Data. Note that in GCC 2015 Clause 6.2.2 a revision has removed limitation of the Employer's right to terminate the Contract.

#### **Access to the Site (Clause 5.4 in 2010 and in 2015)**

- Any potential restrictions (delays) regarding access to any portions of the Site, which may affect the Contractor's programming for construction, should be detailed.

#### **Programme of the Works (Clause 5.6 in 2010 and in 2015)**

- It may be necessary to specify the degree of detail to be provided in the programme, the requirement to provide critical path networks and the specific computer software to be utilised. Note that in GCC 2015 Clause 5.6.2.4 the Contractor is required to reveal float and time-risk allowances in the programme
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### **Contractor's Superintendence (Clause 4.12 in 2010 and in 2015)**

- The Contractor's Site Agent is called the Construction Manager in GCC 2015.
- It may be required (and wise) to state that the Contractor's Construction Manager must be fluent in the ruling language of the Contract as well as some of his employees.

### **Quality of Materials, Workmanship, Equipment (Clause 7 in 2010 and Clause 7 in 2015)**

- There may be a specific requirement to utilize locally produced materials even if this involves a cost penalty.

### **Insurances (Clause 8.6 in 2010 and Clause 8.6 in 2015)**

- Many changes are often made in these clauses, which may be potentially problematic. Some Employers omit these clauses entirely placing the onus on the Contractor to indemnify the Employer and carry all the risk himself. Beware of drafting insurance clauses without the guidance of an insurance expert.

### **Variations (Clause 6.3 in 2010 and Clause 6.3 in 2015)**

- If the Employer, in his contract with the Engineer, has placed restrictions on the Engineer's authority to instruct variations (such as prior approval being required from the Employer) then the Contractor must be advised of this.

### **Progress of the Works - Night and Sunday Work (Clause 5.7.2 in 2010 and Clause 5.7.2 in 2015)**

- It may be necessary to advise the Contractor that for programming reasons it is necessary to work by day as well as by night. This is particularly true on large construction projects such as dams and tunnels.

### **Progress of the Works - Rate of Progress (Clause 5.7 in 2010 and Clause 5.7 in 2015)**

- Where the Engineer orders the Contractor to speed up work or work longer hours because of Contractor caused delays it is possible (if not already done) to provide for the Contractor also to cover the costs of the Engineer in providing additional supervision.

**Extension of Time for Practical Completion - Time for Completion (Clause 5.12 in 2010 and Clause 5.12 in 2015)**

- It may be necessary to specify that the works are to be completed in stages. There may be interface dates with other contractors or the Employer may wish to take over the part of the works to operate it while the remainder is being completed.

A common clause being added in recent years related extensions of time to works on the critical path only.

**Penalty for Delay (Clause 5.13 in 2010 and Clause 5.13 in 2015)**

- It may be appropriate to insert a provision for paying the Contractor a bonus to ensure early completion. The conditions for earning the bonus and the quantum of the bonus need to be provided for in the Contract.

**Adjustment in Prices (Clause 6.8 in 2010 and Clause 6.8 in 2015)**

- Several different Contract Price Adjustment formulae and related indices may well be required; particularly if there is a variety of work disciplines involved.

**Adverse Physical Conditions (Clause 2.2 in 2010 and Clause 2.2 in 2015)**

- There may be the need to warrant certain basic data and ground conditions. In other words the ground rules are agreed beforehand and methods of sharing risk are defined.

**Clause 49 - Interim Payments (Clause 6.10 in 2010 and Clause 6.10 in 2015)**

- To ease the Contractor's financing there may be advance payments such as advances for procuring major construction equipment to ensure that the right equipment is brought to the site. The amounts to be paid and the method by which these payments are recovered through the measurement need to be provided for.

The acceptability of a Retention Money Guarantee in place of the cash Retention should be identified and the form of guarantee included in the tender documentation.

There may need to be provisions for non-taxable or non-dutiable imports. Provisions are also required for payments in foreign currencies for a proportion of the monthly certificate. These matters all need to be attended to and are best dealt with in the Contract Data.

There may also be changes to accommodate cost-plus or Target-Cost reimbursable forms of contract.

#### **Settlement of Disputes (Clause 10 in 2010 and Clause 10 in 2015)**

- It will be necessary to specify which procedures will be followed.

### **5. SUMMARY**

These are but a few of the types of clauses that may or may not be required to meet the specific circumstances of a contract. It must be left to the judgement of the individual as to which clauses are introduced and which clauses of GCC are amended or even in some cases deleted. There are no hard and fast rules regarding the Contract Data except to stress again the need to draft these with the same care as has been applied to the General Conditions of Contract and, for that matter, the Specifications. Generally it is more advantageous to have fewer rather than more amendments introduced through the Contract Data.