

## Construction Industry Development Board

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**Dear Stakeholder,**

Project Management Division of SAICE has presented the CIDB with a draft version of the GCC 2009 for approval as a form of contract in the Standard for Uniformity. The CIDB would like to ensure that the public sector is fully conversant with the revisions evident in the draft GCC 2009, to enable a smooth transition from the GCC 2004 to GCC 2009, once approved. In this regard, the following comments that were collated from various stakeholders, need to be considered.

### **COLLATED COMMENT ON DRAFT GCC 2009**

#### **1) General comments:**

- 1.1 The CIDB requires that the numerous organisations and individuals” that participated in the development of GCC 2009, be acknowledged. List the organisations that have endorsed the final draft.
- 1.2 Clause 2.1.1 reads “The Employer shall have made available to the Contractor, as part of or by reference in the Site Information, all data relevant to the Works obtained by or on behalf of the Employer, but the Contractor shall be responsible for his own interpretation thereof and deductions therefrom”. It is impractical to make all data relevant to the works available.
- 1.3 Question: is an email or an SMS an acceptable form of communication? (see 1.2.1)
- 1.4 Clause 3.1.2 requires the Engineer to “act impartially.” Is it possible to act impartially, given that the Engineer is appointed by the Employer? Will he not bat for his pay master?
- 1.5 What does clause 3.1.4 mean? i.e. “Such an agent, if not the Engineer, shall be responsible to the Engineer in terms of these Conditions of Contract”.
- 1.6 Table 16 of the Statistical News Release P0142.1 does not contain a “Civil Engineering Plant Index” or a “Diesel Index” and Table 15 does not contain a “Civil Engineering Materials Index”. The CPA indices need to be correctly referenced.

#### **2) Definitions**

- 2.1 The term “Activity Schedule” is defined and is only mentioned in the definition for “Pricing Data.” The term “Prices” is defined in a similar manner as “Activity Schedule” and is likewise only mentioned in “Pricing Data”. The term “prices” is used throughout the text. The payment clauses don’t deal with how the amounts due from “Prices” and “Activity Schedule” are to be assessed – prorata or upon completion of the activity?
- 2.2 The term “Lump Sum Contract” is defined but does not appear in the text.
- 2.3 The terms “Prices” is defined but does not appear in the text – only “prices does”. This definitions appears to conflict with Total of Prices used in the Form of Offer and Acceptance.
- 2.4 “Contract sum” and “Prices” appear to clash.
- 2.5 The term “Completion” is poorly defined.

- 2.6 The term “Technical data” is not defined.
- 2.6 What does “approved” mean? What is the difference between “acceptance” and “approval”

### **3) Basis for assessing payment**

The definition for Bill of Quantities is defined as:

means the document so designated in the Pricing Data that lists the items of work and the quantities and rates associated with each item to allow the Contractor to be paid at regular intervals an amount equal to the agreed rate for the work, multiplied by the actual quantity of work completed.

It is clear from the above that payment is made for completed work. What is the basis for payment for activities – completed or on a prorata basis. This should be spelt out in the contract.

### **4) Payment procedures**

- 4.1 GCC 2009 does not establish requirements for the provision of tax invoices. This can be problematic, particularly since the Engineer is required to certify the amount. Clear procedures for the submission of tax invoices must be provided.
- 4.2 The NEC3 and JBCC PBA make the Project Manager or Principal Agent responsible for preparing a payment certificate. GCC makes the Contractor responsible for doing so. GCC is used predominately on small to medium sized contracts where the smaller contractors might have difficulty in preparing such statements. At the same time, GCC does not permit the Employer to co-ordinate payment runs on a specific day with the provisions in the contract. Amendments to the contract need to be made in order to do so.

### **5) Dispute resolution provisions**

- 5.1 Provision is made for:
- 1) amicable procedures involving “conciliation, mediation, “expertise procedures” and an “expert panel” in terms of a formal procedure;
  - 2) a dispute resolution board, which resolves differences by means of avoidance, advisory, recommendation and adjudication procedure, or adjudication; and
  - 3) arbitration or court proceedings

These procedures are confusing and unnecessarily complicate concepts and procedures.

- 5.2 It is not understood why procedures for amicable settlement are provided for in the document. It should be noted in this regard that JBCC PBA, NEC3 and FIDIC Red, yellow and silver books don't make provision for an amicable settlement as an alternative to adjudication as the parties are always free to settle a dispute in any manner that they agree to. (FIDIC requires that an attempt be made to settle any dissatisfaction regarding the ruling of the DAB amicably before proceeding to arbitration). There is no necessity to detail specific procedures for amicable settlement – these belong in guidance documents.
- 5.3 Disputes are still referred to the Engineer for resolution. It is not understood why a contractor cannot approach an Engineer to review and possibly revise his ruling in order to avoid a dispute. There is no need to formalise such a procedure in the contract. This reduces the time to resolve disputes.
- 5.4 The matters which may be referred to an adjudicator or the Dispute Board are limited to those associated with the actions of the Engineer. Any dispute should be capable of being referred to adjudication. This needs to be rectified.

- 5.5 Adjudication or resolution by a Dispute Board can be avoided if one of the parties opts for amicable settlement. This is unacceptable and needs to be rectified.
- 5.6 The Dispute Board procedures are complex and confusing. The referring of the same dispute under a different method to the same person for resolution is not helpful. How can one give advice and then adjudicate on a matter? Is this not a player / referee scenario? Can one be objective in such matters? This also might open the door for corrupt practices. (See legal opinion from CIDB Law Advisor)
- 5.7 Potential conflicts of interest in the Dispute Board may occur e.g. The Board adjudicates on a matter where the opinion of the Board has been completely disregarded.

The CIDB will allow Clients to provide their comment and critical analysis of the merits of the draft GCC 2009. The outcome of this discussion will guide the CIDB in the development of a response to the Project Management Division of SAICE on the draft GCC 2009.

Kind regards,



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