



Contract Management

Training session for EIB Promoters



European
Investment Bank

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Agenda

- 1. Contract Management Overview*
- 2. Contract Modifications*
- 3. Contract Remedies*
- 4. Claim Management in Construction*
- 5. Price Indexation Clauses*
- 6. Quiz*
- 6. Questions and Answers*



EIB support
and advisory

Contract Management Timeline

Procurement
strategy →
Procurement
Plan



Contract Types (some examples)

Unit Price Contract

Unit price (Itemized) contract – useful for projects that can be easily quantified in units (e.g. excavation works)

Often used in the construction sector of simple infrastructure where design is fully ready and everything is clear.



Time and material contract – payment against actual costs of material and labour.

Typically used when the scope and quality is not fully defined or expected to change (e.g. renovation of the chain of shops). High-risk for contracting entities.



Turnkey contract – Contractor fully responsible to plan, design and construct, and to make necessary adaptations to make the project fully functional and 'ready to use'.

Typically in construction of facilities that need to be but fully equipped (e.g. power plant, factory). May be expensive.



EPC (Engineering, Procurement, Construction) contract – a type of turnkey contract that may or may not include the complete project scope.

Typically used for large-scale and complex infrastructure works (e.g. wastewater treatment plant, airports).



Lump-sum / Fixed-price contract – useful for projects with a clearly defined scope (e.g. service and supply contracts, or simple works where complete and high-quality design exist).



Time-based contract – payment against fixed rates based on actual time spent.

Typically used for larger value, relatively complex services where the scope is difficult to be established.



Performance-based contract – payment against specified measurable deliverables (defines WHAT needs to be delivered not HOW), often incentivised.

Typically used for (e.g. services, road maintenance, drilling rigs). Require good planning.

The more a project is simple, well-defined with complete good quality documentation and clear objectives, fairly doable within the determined timeframe, the more appropriate unit price or fixed-price contracts are.

... and many more...

When the project is large and complex or in the process of being developed, when the documentation is not complete or low quality / outdated, the EPC / Turnkey contract is the best option.

Design / Build / Operate Contract Types - Works



Mature project, high quality design and in-house capacity to plan, prepare and manage several contracts.

Complex project with no design where the project owner wants to keep ownership over operation and maintenance.

Complex project when contractor is better placed to manage the contract as one.

Main Contract Types - Services



Lump sum / fixed price contract

- Delivery of service in exchange for the fixed price.
- Payment usually occurs on an instalment basis.

Suitable for predictable well-defined simple deliverables with low risk for unforeseen issues, such as errors, omissions, discrepancies and changes in specifications.

Time-based contract

- Services are provided based on fixed fee rates.
- Payments are made on the basis of actual time spent.

Suitable when it is difficult to define the scope or duration of services. Widely used for complex studies, supervision of works contracts, advisory services, training assignments.

Milestone-based contracts are a type of fixed-price contract where payment is made at certain milestones in the project.

Performance-based contracts where the consultant's fee is based on the results achieved. Payments are made when set objective is reached.

Contract Types - Supplies



Unit price (Itemized) contract – for simple and off-shelf goods.



Turnkey contract – Fully complete and ready to operate equipment (designed, supplied, installed, operation for an initial period may be included as well). Typically used for equipment of high or complex technology.



Design-Supply-Erection contract – includes supply to construction site, erecting, testing (usually includes the training as well). Typically used for goods of high or complex technology (e.g. large boiler, power plant, pumping station, turbine, assembly line).



Design-Supply-Installation-Maintenance contract – upgrade of design-supply-erection contract to include the maintenance.



Lump-sum / Fixed-price contract – useful for goods with clearly defined specifications.

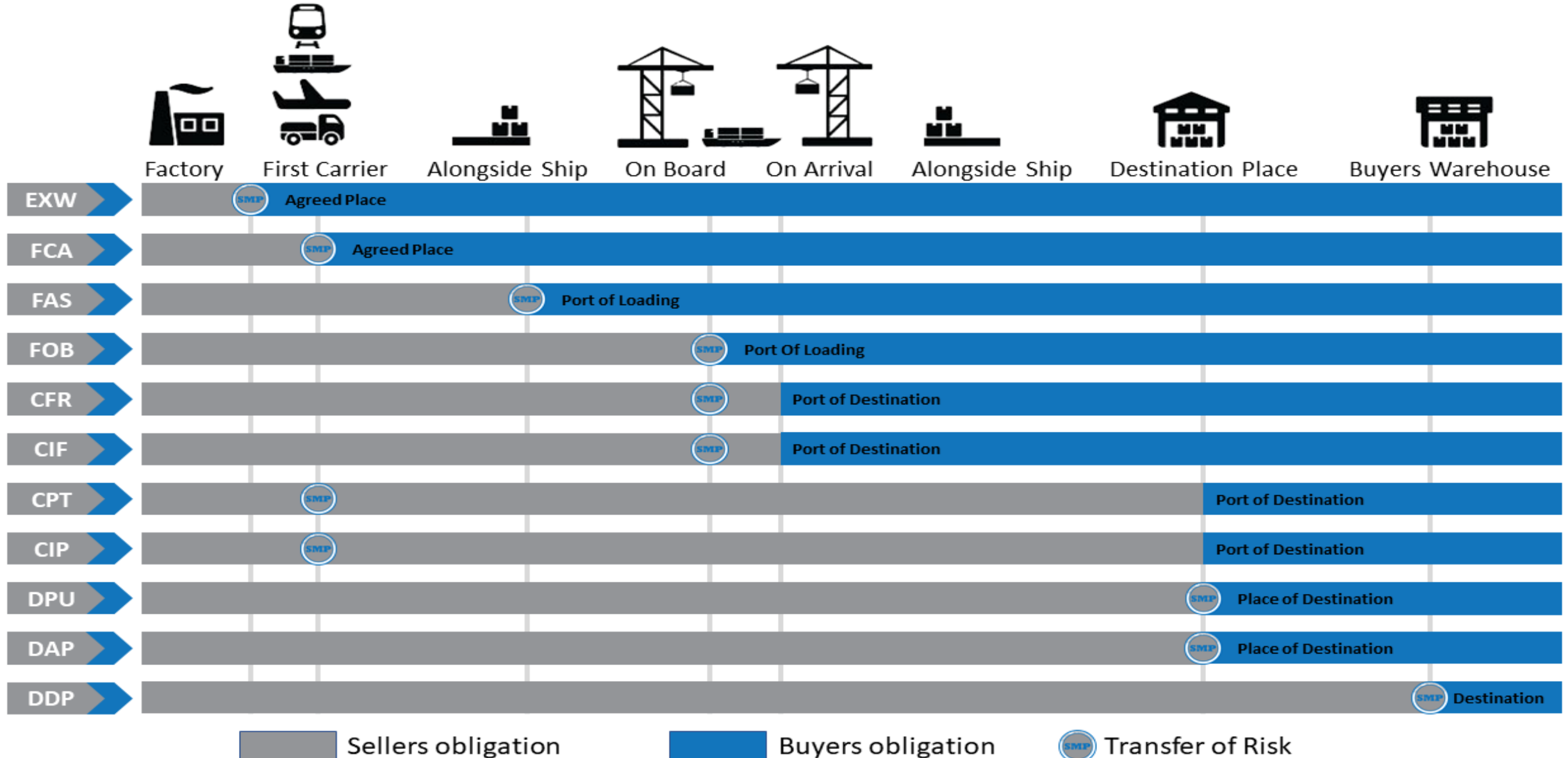
Supply contract main elements:

- Price (breakdown per units and type) with quantity
- Item detailed description with technical specifications
- Schedule of delivery/ies and the destination
- Who is responsible for taxes, duties, consular fees, terminal charges, arrival & destination charges
- Responsibilities of parties (licences and certificates for export/import, packing and marking, insurance, risk of loss or damage, transports, loading and unloading)
- Documentation required for transport, transfer, customs clearance, proof of delivery...



Supply Contracts - Incoterms

Incoterms – most commonly used to clarify **tasks**, **costs** and **risks** between buyers and suppliers.



Supply Contracts - Incoterms

Incoterms for any mode of transport:

EXW **Ex Works** ▶ Supplier makes goods available for pickup at their location. Promoter - all the risk and transport costs.

FCA **Free Carrier** ▶ Supplier delivers the goods to a named destination. Promoter - risk and transport to the shipping carrier and final destination.

CPT **Carriage Paid to** ▶ Similar to FCA. The risk is transferred from the supplier to the promoter at the delivery point, but the cost of transport to the final destination stays with the supplier.

CIP **Carriage and Insurance Paid to** ▶ Risks stay with the supplier until the goods are delivered to the FIRST carrier at the place of shipment – not the place of destination. From the first carrier onwards, the risk is on the promoter.

DAP **Delivered at Place** ▶ Supplier delivers the goods, ready for unloading, at the named place of destination.

DPU **Delivered at Place Unloaded** ▶ Supplier - all the risk and transport until the goods have been unloaded. Promoter - the risk and transport from the terminal to the final destination.

DDP **Delivered Duty Paid** ▶ Supplier – all the risk and transport, including clearing the goods for export and paying export and import duties.

Incoterms for sea and inland waterway transport:

FAS **Free Alongside Ship** ▶ Supplier clears the goods for export and places them alongside the vessel at the named port of delivery.

FOB **Free on Board** ▶ Supplier delivers the goods on board the designated ship. Promoter – all the risk and transport depending whether FOB shipping or destination point.

CFP **Cost and Freight** ▶ Supplier delivers the goods to a designated port and load them on a specified ship, paying all transport and loading costs. Promoter – the cost and risk from designated port to its site.

CIF **Cost, Insurance and Freight** ▶ Supplier delivers the goods to a designated port and load them on a specified ship, paying all transport, insurance and loading costs. Promoter – the cost and risk from designated port to its site.

Mixed contracts



Why is important to determine the type of contract?

International or national procurement procedure?

Nature of the Contract	Threshold in Euro
Works	5 million
Goods and Services except Consultancy services:	200,000
In General	400,000
Electricity, Gas, Water and Transport	600,000
Telecommunications	



How to determine main subject of the contract?

Supplies / services: Value test

Greater value determines the type of the contract. If the value is equal, it is a supplies contract.

Works / services: Principal object of the contract

Works / supplies: Principal object of the contract

Determine which objective prevails. The value does not matter.

Main Contract Elements



Scope of Work

Scope of Work/Services/Goods: Defines the specific tasks or deliverables expected to be completed under the contract (e.g. description tasks, quality, phases, technical specifications, end product, expected performance...). Must be clear what is out of scope.



Project Timeline: Specifies the start and end dates, detailed schedule of work/deliveries (calendar or work days), DNP/guarantee period, as well as any critical milestones along the way.
Define the process in cases of delays.



Price and Payment: Outline the total payable amount, detailed breakdown of price, with clear timing / installments, advance payment, retention, terms and conditions of payments.
Set the guarantee (advance, performance) payment conditions.



Contract Performance Indicators: Measurable, attainable, specific and pertinent to the contract (e.g. resources consumption, E & S standards, actual working days vs available working days, % of delays, defect rectification etc.).
Include penalties or incentives.



Monitoring and Reporting: Outlines schedule, timeline, content.

Details on e.g. physical and financial progress, update of work/delivery schedule, material and equipment in use, safety, potential delays, issues, anticipated cost overruns, overview of performance indicators, E & S...



Change Management: Outlines how changes to the scope, timeline, or budget of the project will be managed (e.g. variations, change orders, amendments...).



Risk Management and Dispute Resolution: Outlines how risks associated with the project will be identified, assessed, and mitigated (including the E & S) and defines dispute handling process.

Risks should be regularly assessed and mitigations monitored.



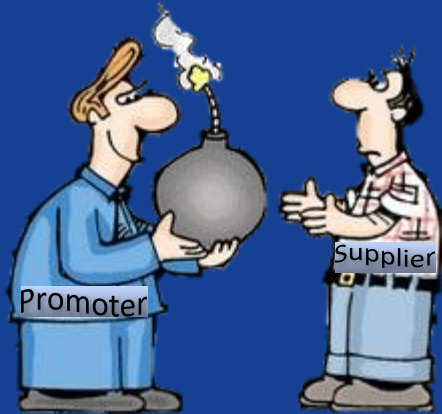
Termination: Provisions for termination, including the conditions under which either party can terminate the contract.

Importance of Balanced Risk Allocation

...and balanced tender requirements,

and balanced selection and award criteria,

and good quality TD in general...



-  Low participation in procurement
-  Procurement failure
-  High price
-  Award to a tenderer who fails (not estimating the requirements properly)
-  Poor quality and delays
-  Frequent disputes
-  Contract termination

Otherwise:



2. Contract Modifications



Guide to Procurement

§ 3.5.1. Public sector operations

“*Prior review: All International Procurement Procedures are subject to prior review by the Bank. **Prior review means that Promoters must send to the Bank the relevant documentation and seek the Bank’s concurrence prior to all major decisions regarding procurement, as follows:***”

...

After the contract signature, **any contract modification the cumulative effect of which causes an increase from the original contract price by more than 15% prior to its conclusion must be** sent to the Bank.”



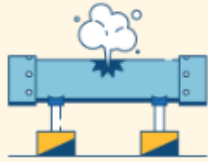
Prior review = non-objection from the EIB

Ex-post review = no non-objection from the EIB

If procurement procedure not acceptable = no EIB financing of the contract

If it is seriously jeopardizing the project technical or financial viability / EIB’s reputation = no financing of the contract or even of the project

Common reasons for contract modifications



Unforeseen
Circumstances



Incorrect
Building Plans



Inspection
Requirements
/ Change in law



Additional
Features



Delays



Inaccurate
Budgets

Particular attention to contract modifications that:

- If included in the original tender, would have **allowed/attracted more tenderers** and/or could potentially **change the award decision** (e.g. **decreased scope**, applicants not passing the PQ phase could have been qualified or **increased scope**, larger players on the market could have been interested)
- Would change the **economic balance** of the contract in favour of the contractor (e.g. granting additional profit to the contractor by for example increasing the unit prices in discrepancy with market prices or reducing the contractor's risk of incurring penalty payments)
- Would **considerably extend the scope** of the contract (e.g. new works/services/supplies that could easily be procured separately)
- **Replacement of the original contractor** - even if allowed (e.g. in cases or reorganisation – merger, takeover, acquisition...), the new contractor must fulfil original selection criteria)

Situations usually not requiring a new procurement procedure.

1. Clear, precise and unequivocal review clauses in the TDs

- (i) state the scope and nature of the possible changes or options as well as the conditions under which they may be used, and
- (ii) do not permit changes that would alter the overall nature of the contract.

- Importantly, the requirement is not for the clause to be in the actual contract. It must be in the 'initial procurement documents', i.e. the tender documents issued to tenderers.

2. Additional necessary works, services or supplies

Attention:

- ✓ increase in price **must usually not exceed 50%** of the original contract value

Pre-condition: a change of contractor is not allowed.





Situations not requiring a new procurement procedure (part 2)

3. Unforeseen Circumstances

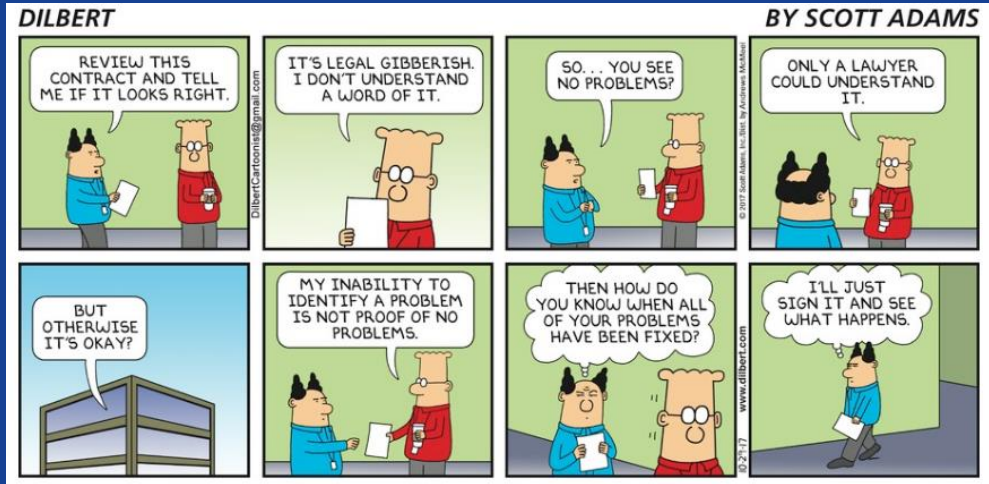
Brought about by circumstances which a diligent authority could not have foreseen, and the change does not alter the overall nature of the contract.
✓ Usually must not exceed 50% of the original contract value

4. New Contractor

Only if:

- (i) foreseen in the original tender (see point 1) , or
- (ii) due to succession provided that the new contractor meets the original pre-qualification criteria and the modification is not aimed at circumventing the rules

Situations not requiring a new procurement procedure (Part 3).



5. Low value (non-substantial) modifications

Where the change does not exceed:

- (i) relevant works, services or supplies threshold, and
- (ii) does not exceed either 15% cumulatively of the original contract value

6. Other non-substantial modifications

A modification will not require a new tender procedure if - irrespective of its value – it does not result in one or more of:

- (i) the contract being materially different in character from the one initially concluded,
- (ii) the change introducing conditions which, if they had been included in the original procurement, would have allowed admission of other candidates or the acceptance of another tender or attracted additional participants in the procedure,
- (iii) the economic balance of the contract goes in favour of the contractor in a way that was not originally provided for,
- (iv) the change considerably extends the scope of the contract, or
- (v) a new contractor replacing the contractor originally awarded the contract in circumstances not permissible under the fourth situation above.

Recommendations and Tips



**15%
threshold**

Remember to submit the contract modifications cumulatively above 15% of original price for EIB prior review before its signature

**Material
modifications**

The promoter is encouraged to submit material modifications for the prior review even if below the 15% threshold (non-objection not needed)



Poor or inadequate design – allocate efforts to improve or consider the design-build type of contract



When extensions/extra deliveries are highly possible, it is recommended to include grounds for amending the contract (scope, conditions and nature with clear prices and prices calculation methods) in the original tender (e.g. works supervision linked with the duration of works contract)



Variation orders/change orders/variations...

There must be precise terms in contracts introducing the variation orders with **clear identification what is and is not included** and with **clear price** indication and **price calculation method**.

Variation orders cumulatively **increasing the contract value by more than 15%** are normally reviewed as contract amendments.

Once the number and scope of variation orders becomes substantial, it is **good practice to sign an amendment** to cover all previous variations and have a clean overview over modifications

CONTRACT

I absolutely refuse to sign anything which requires a microscope and a stepladder to read it!

Contract modifications are a common practice, but should not be used to circumvent the requirements of a public procurement!

3. Contract Remedies



Performance Security

Breach of Contract

A breach of contract occurs when one of the parties to the contract fails to comply with any of his obligations under the contract.

Performance Security



- A performance security is issued to one party of a contract as a guarantee against the failure of the other party to meet the obligations of the contract
- **Serve the purpose to ensure the proper and timely completion of the duties under the Contract.**
- Usually in the value of 10% of the contract value
- **Can be called in case the contractor breaches its obligations under the contract**
- The wording is very important as it will specify the conditions under which the security can be forfeit.
- **Non-performance has to be established before the performance security can be called**

Liquidated Damages



- Liquidated damages are a fixed or agreed sum, that shall be paid as damages for some breach of contract.
- In works contracts, is commonly used when the contractor fails to complete and hand over the works on the agreed date. If that happens, the contracting authority is entitled to an amount stated in the contract as liquidated damages for every day of delay due to failure on the part of the contractor.
- Usually capped at 10% of the contract value (then termination can be considered).
- If deducted from the payments, is important to have a payment schedule that allows for the deduction of liquidated damages



The contracting authority will not have to give proof that it suffered actual loss. The mere fact that a delay exists is a sufficient basis for imposing liquidated damages ≠ General Damages.

Termination of Contract



- **Last contract remedy in case of breach of contract.**
- Before resorting to termination, the issuing of warnings to the contractor or, in the case of defects, instructions to remedy should be considered.
- Termination of the contract does not result in a cessation of all rights and obligations and activities.
- **Termination needs to be supported by records (evidence) that the one of the parties breached the contract, justified by the contractual terms, and following the terminations T&C's stipulated in the contract.**



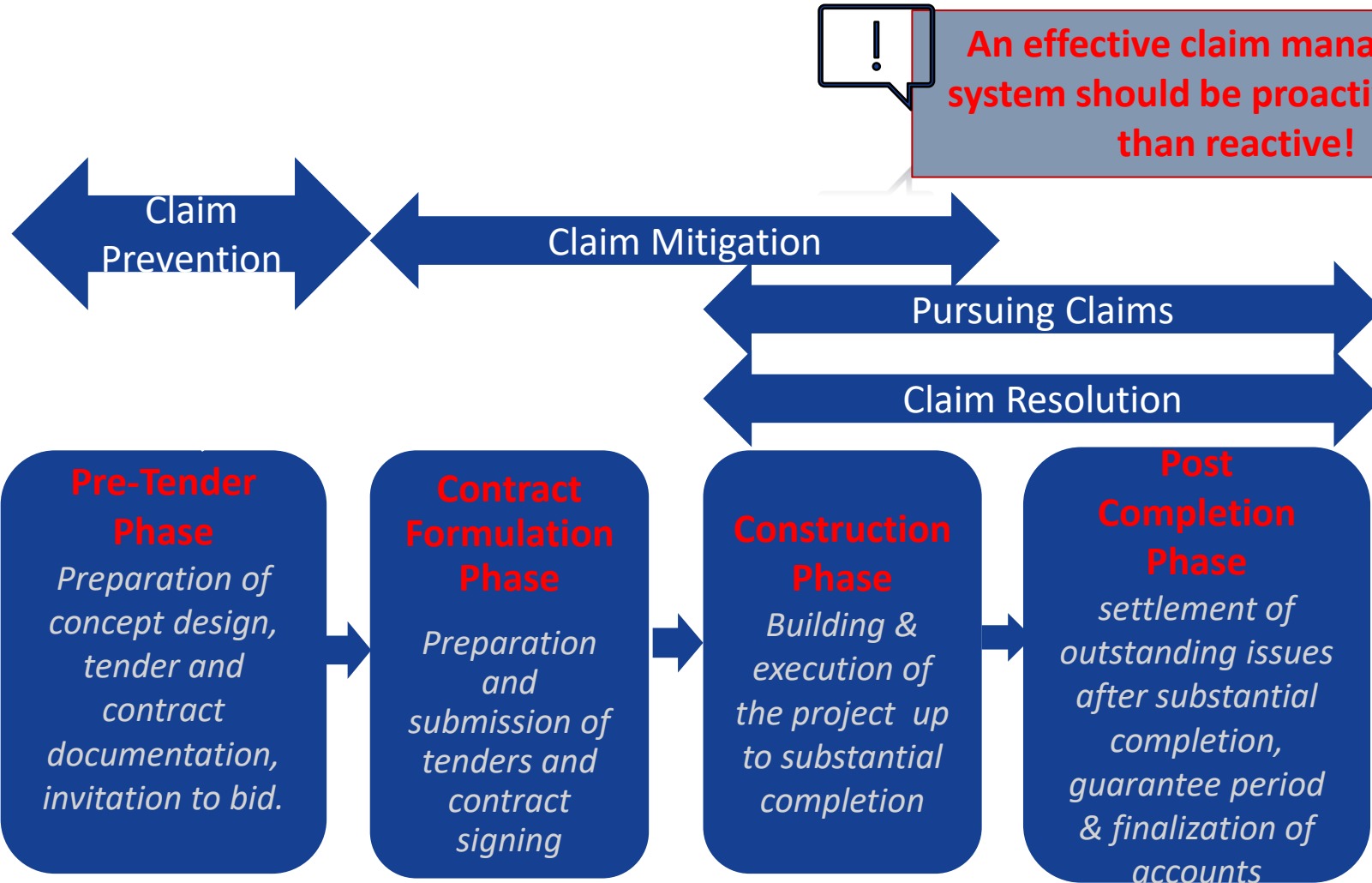
In the case of contract termination, **the promoter is required to inform the Bank of its intention to terminate the contract and the grounds for such termination.** The Bank reserves the right to withdraw its financing of the contract in case the contract termination was not justified and/or was conducted in breach of the contractual provisions

4. Claim Management in Construction



Construction claim management is the process of identifying, assessing, and resolving claims that arise during the performance of a contract.

An effective claim management system should be proactive rather than reactive!



A *Claim* is a request or assertion by one contracting party to the other party for an entitlement or relief under any clause of the conditions of contract or otherwise in connection with, or arising out of, the contract or the execution of the Works. (FIDIC)

Claim Prevention and Mitigation - Construction

Prevention

Quality Contract Documents

Dispute Resolution Methodology

Constructability and Biddability Reviews

Management of Outsourced Design Services

Mitigation

Timely Payments

Timely responses to contractor's notices

Implement cost, schedule and quality control procedures

Timely possession of site

Document Control System

Risk Allocation and Management Plan

Read and Understand the Contract

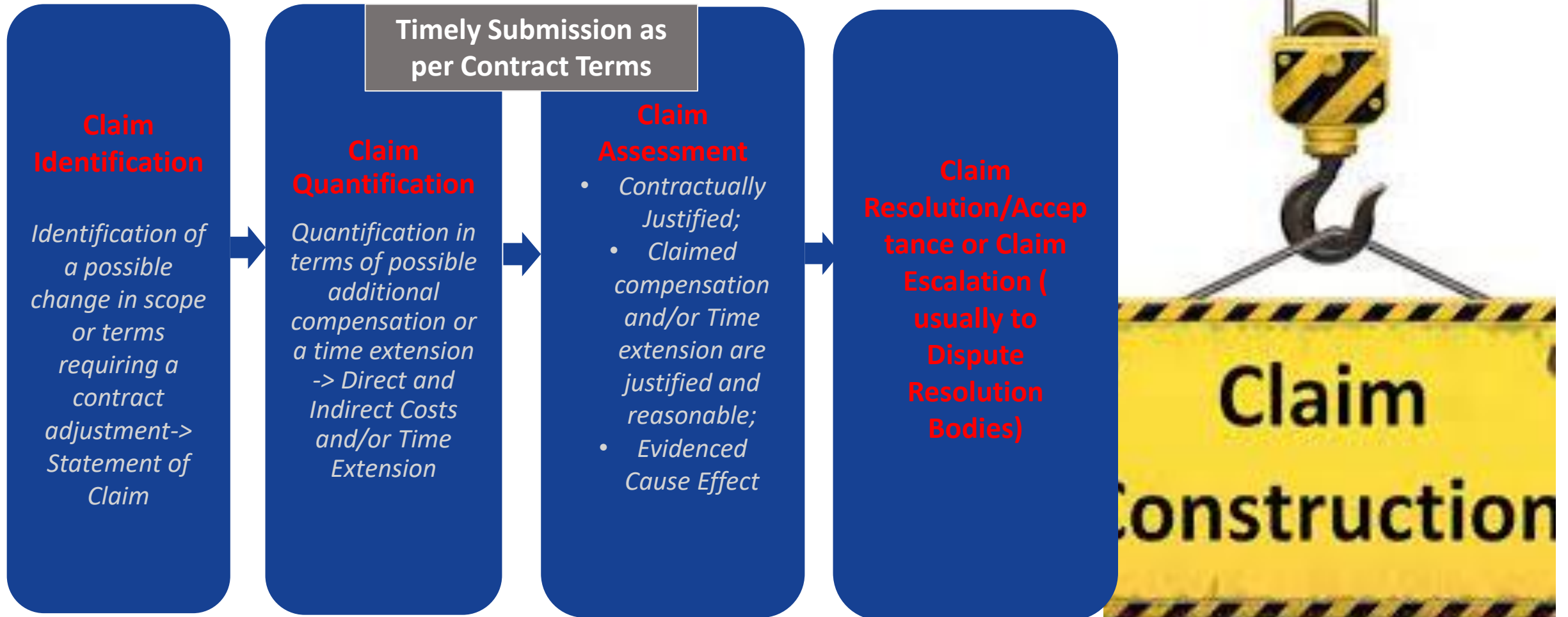
Define roles and responsibilities

Develop performance criteria

Progress Reviews



Claim Pursuance and Resolution



Dispute Resolution

Negotiation

The most convenient, cost-efficient, and faster way to settle construction disputes, avoiding other time-consuming and expensive dispute resolution methods. Usually allows the positive relationship between the parties to be kept.

Dispute Avoidance/Adjudication Boards (DAAB)

Provided for instances under FIDIC Contracts as a dispute adjudication process, comprising one or three independent and impartial persons selected by the contracting parties before contract start. Empowered to provide informal Assistance as well. Its decisions are binding unless one party issues NOD.

Arbitration

GtP 3.7.4 requires that TD's should include provisions dealing with settlement of disputes and recommends the use of International commercial arbitration such as International Chamber of Commerce ("ICC") or International Centre for Dispute Resolution ("ICDR"). **Construction and engineering projects consistently generate the largest percentage of commercial disputes before international arbitral bodies.**

Promoter Recommended Due Diligence

- **The promoter is recommended to have quality checks in place on the tender and design documentation, and confirm those are ready and complete to be bid.**
- The promoter is recommended to carefully verify the planning and project milestones to avoid delays (ex: Works contract awarded without supervision in place; no access to the site to the awarded contractor)
- **If TA is engaged, its recommended to include the verification of biddability and constructability of the contract documentation as part of their scope of services;**
- When drafting Tender Documents the promoter shall ensure the process for variation orders, claims and dispute resolution mechanism is included as part of the T&C's of the Draft Contract and that the draft contract or at least the key parts are included;
- **Performance criteria is clear, quantifiable and measurable;**
- The promoter is recommended to have in place (i) cost, schedule and quality control procedures, (ii) document control systems (iii) regular progress reviews meetings are scheduled and (iv) payments are undertaken as per T&C's ;
- **The promoter is recommended (and TA if applicable) to become thoroughly acquainted with the T&C's of the contract.**



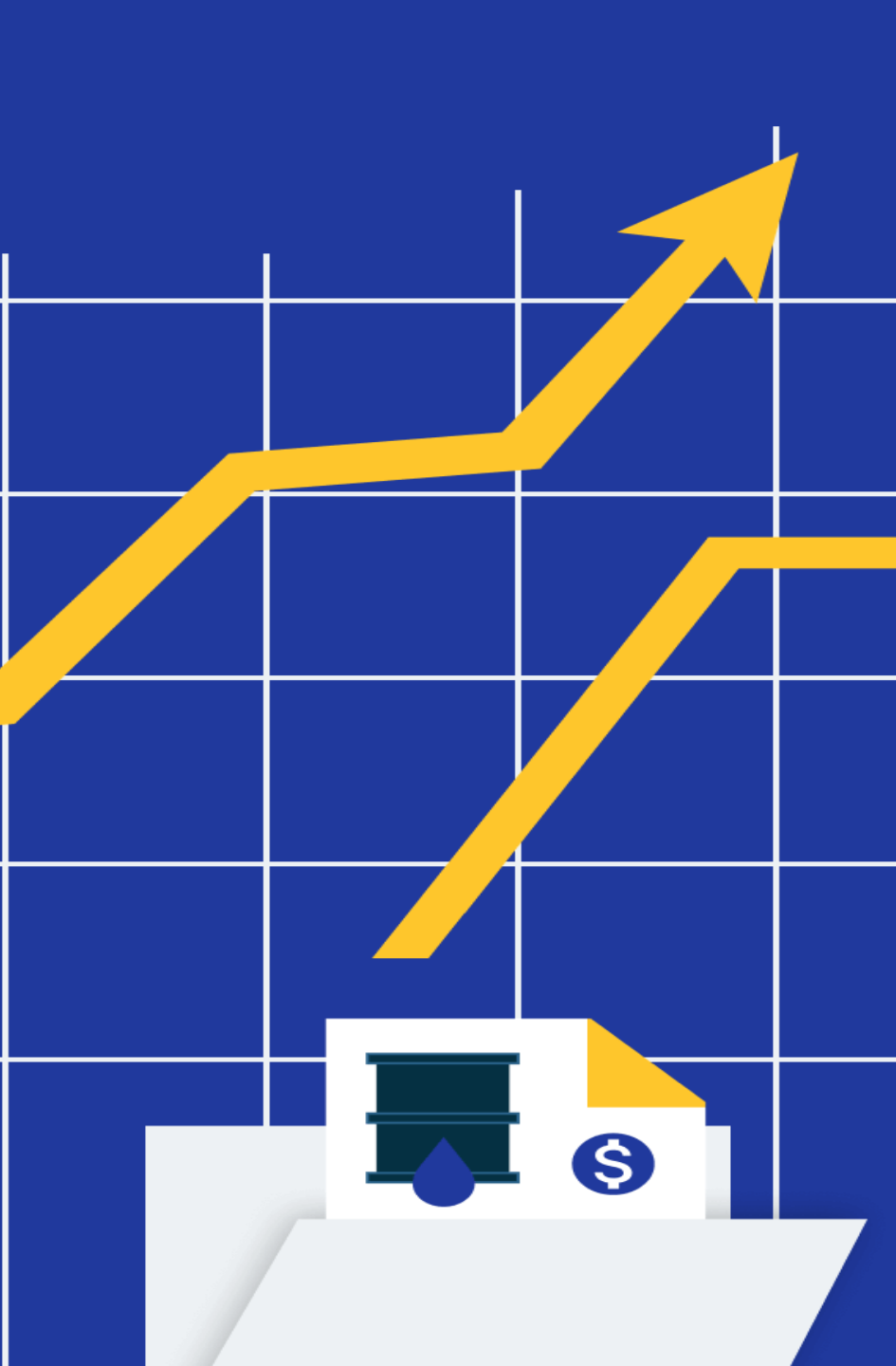
5. Price Indexation Clauses



Recent Crises and Costs Increases

Background:

- Effects of inflation caused by the COVID-19 pandemic and amplified by the war in Ukraine – starting in 2023, contractors are finding it difficult to fulfil their contracts, especially in the public construction, with some having even ceased all construction activity.
- Some contracts do not include price indexation formulas;
- Promoters facing difficulties with ongoing contracts - contractors requesting significant price revisions, abandoning sites;
- EIB Teams are requested to review contract modifications which insert price indexation formulas during contract implementation.



No 'one-size-fits-all'

Promoter should consider:

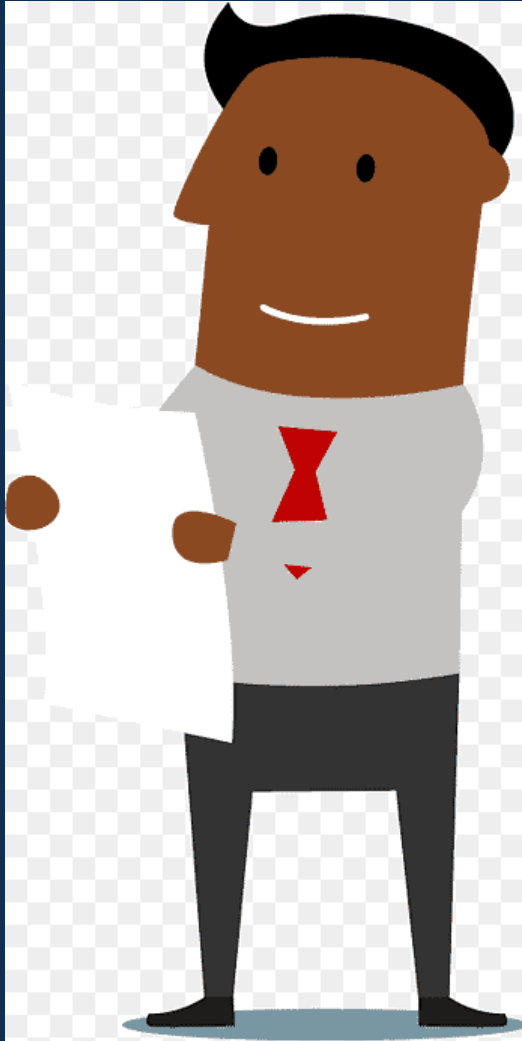
- ✓ Contract **termination** and **retendering** – if both contract parties in agreement (e.g. other market circumstances such as shortage of resources, contractor under bankruptcy may make the contract non-implementable)
- ✓ **Budget constraints** - not only one-off; introducing the formula may lead to multiple contract modifications
- ✓ Whether price increases could have been **foreseen** within the normal market behaviour
- ✓ Are the particular components that had increased prices identifiable and have **objective, adequate** and **verifiable** price indexes to feed-in the formula
- ✓ To which **period** a price indexation formula should be applied



No right to get the indexation formula if not originally included in the tender.

Introducing a price indexation formula should not serve to bypass the procurement rules and should not be at the detriment of tenderers who have not won the contract!

Price Indexation Formula Included in the contract



Price Indexation
Formula
Included in the
Contract



- The promoter applies the formula as per the conditions included in the initial procurement documents, **paying attention that the inputs, indexes and time references utilized are correctly applied;**
- Requires EIB non-objection if: i) award was subject to NO and ii) leads to a cumulative contract increase of more than 15% over the initial contract value

Review of Contract Modifications requiring Inclusion of Price Indexation



National Framework includes Price Indexation Formula

Usually the applicable law of the contract is the national law, therefore can be explored, if legally acceptable, to introduce price indexation formulas in line with national frameworks.

Price Indexation Formulas of other MDB's

In case National Framework can't be applied, can be explored the use of other MDB's Price Indexation Formulas.

Inputs, Indexes and Time Periods

- Identify key inputs that need price adjustment;
- Apply official and verifiable Indexes of the country or countries of the payment currencies.
- The first month for which the adjustment is supposed to take effect, should be the month after the events which leads to this unforeseen modification took place



EIB Applicable Review:

- **Regardless of the value, such modifications should be subject to EIB review and non-objection;**



Recommendations :

Moving Forward, promoters are recommended to include Price Indexation Formulas in the Initial Procurement Documents.

While the promoters may intend to assign the inflation risk to the contractors, this may lead to overall higher risk as:

- a) contractors will include in the price contingencies for price increases which will result in higher average prices being offered.
- b) the bidder which takes the higher financial risk, will be better positioned to win the tender, significantly increasing the risk of nonperformance and default in case of sharp prices increase.

- ❖ The longer the contract implementation period, the bigger risk that the market prices will change.

The Inclusion of price indexation formulas is even more critical in contracts which implementation period is above 18 months.

- ❖ In case of contracts with several currencies, price adjustment formulas for each currency shall be included;
- ❖ “Provisional Sum for Price Contingency” can be included as part of the contract.
- ❖ Promoters may want to cap the % resulting from the indexation formula;
- ❖ If the resulting increase is above the country inflation, may be a red flag.

6. Quiz

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Question No.1

A works contract for a new university building was awarded in the original value of 82,000,000 € in January 2023. A first contract amendment was signed in April 2023, increasing the value to 91,500,000 €. Now a second contract amendment in the value of 4,230,000 € for additional works is submitted by the contractor and approved by the Engineer. Which of the following options is correct ? (more than one option can be correct)

- a) The contract amendment can't be concluded, as due to the value of additional works, a new procurement procedure is required.
- b) The contract amendment is in the value of 5% of the original awarded value, therefore the promoter can proceed with its signature without further verifications.
- c) The second contract amendment refers to access road works not originally included in the tender, therefore the promoter shall review and conclude about its acceptability.
- d) The second contract amendment leads to a cumulative change value of 17%, therefore EIB non-objection is required.

Question No.2

Several contract amendments with cumulative value below the 15% of the original contract price are to be signed. The EIB policy is to:

-  a) Review all contract amendments before their signature regardless of their value.
-  b) Review contract amendments that significantly change the scope, value and economic balance of the contract.
-  c) Review all contract amendments not increasing the original price more than 15% after their signature, i.e. ex post review.
-  d) Finance contract amendments of small value without any review.





Question No.3

Which of the following have the potential to lead to claims during the implementation of a works contract?
(more than one option can be correct)

- a) The design was completed in 2017 without further reviews being undertaken, the tender was issued in 2022, and the contract awarded in 2023.
- b) The executed contract includes payment terms of 30 days upon receiving of the complete invoices by the Contractor, but due to work overload of the accounting department, the average time for payment so far is 130 days.
- c) The contract was originally managed by John Smith, representing the promoter, but due to its recent retirement, the management of the contract has yet not been allocated to another staff.
- d) The promoter has in place a document control system which allows a fast, streamlined and complete access to all the historic documents and communications related to the contract.

Question No.4

During the implementation of the works contract with the original contract value of €50 m, the contracting authority, with the endorsement of the supervising engineer, approved a series of change orders amounting to extra €50 m without consulting the EIB.

-  a) The change orders must be submitted to the EIB for review of their alignment with the EIB's policy requirements.
-  b) In duly justified circumstances (e.g. emergency), if aligned with the works contract conditions and not changing the original major tender requirements, the EIB may still decide to co-finance the additional costs even when such change orders have not been submitted for the EIB's prior review.
-  c) In the case that change orders are seriously breaching the EIB's policy, tender requirements and also jeopardizing the EIB's reputation, the EIB may still consider to finance such costs, but that would require a derogation from the EIB's Guide to Procurement.
-  d) In the case that change orders are jeopardizing the project viability and the EIB's reputation, the EIB may stop financing the project.

Question No.5

The tender documents for the supply of laptops included a clause defining the allowed window for delivery between 90-150 days. Tenders with delivery times above 150 days would be rejected. The lowest compliant and technically responsive bidder proposed 120 days for delivery and was awarded the contract. Two months after contract signature, the supplier sends a short email “Due to some issues on the supply chain, we request a change on the contract delivery times to 6 months”. Which of the following actions would you consider? (more than one option can be correct)



a) You have worked with this supplier in the past, and you had a good experience, so you agree with their proposed change.



b) You believe the proposed contract amendment may not be acceptable as introduces conditions which, if they had been included in the original procurement, would have allowed the acceptance of another tender or attracted additional participants in the procedure .



c) You negotiate with the supplier, agreeing with the proposed change on the delivery times, but asking a significant reduction on the contracted price as compensation.



d) You advise the supplier to follow the conditions of the contract and for the Supplier to officially notify the Promoter in writing of the delay, its likely duration, and its cause, so the promoter can evaluate the situation and provide its opinion.

Question No.6

A works contract was signed in 2021 and did not include a price indexation formula. In September 2023, the Contractor threatens to abandon the site, requesting the inclusion of a price indexation formula, stating that due to current inflation, it is unable to complete the works. Which of the following actions would you consider? (more than one option can be correct)

- a) You propose to apply the current inflation country index to the awarded contract amount.
- b) You carefully consider the implications of agreeing to the inclusion of a price indexation formula, taking into account budget constraints, and balancing the possibility of contract termination and re-tendering.
- c) You review the applicable contractual law, to understand if it is legally acceptable to introduce price indexation formulas in line with national frameworks.
- d) You do not agree with the contractor proposal but offer instead a lump sum of 5% to compensate for its losses.



THANK YOU



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