

International Humanitarian Infrastructure Platform

WASH PARTICULAR CONDITIONS OF CONTRACT FOR CONSTRUCTION

Harmonized for the humanitarian response

NOVEMBER 2020 Edition

Public version - ihip.earth



Particular Conditions to FIDIC SHORT FORM of Contract for the WASH humanitarian sector – NOVEMBER 2020 Public Edition

*HARMONIZED PARTICULAR CONDITIONS prepared by IHIP WASH CONTRACT COMMITTEE
November 2020 - contact point contact@ihip.earth*

This part is considered complementary to the General Conditions part of the FIDIC SHORT FORM of Contract (First edition 1999) and the following Conditions shall be considered as Particular Conditions of the Contract.

Whatever stated in these Particular Conditions such as addition, deletion or amendment to the General Conditions Clauses shall prevail and is to be taken into account to the extent that clarifies or adds or amends these Clauses.

This document is provided on an information only and non-reliance basis, and is not intended to provide any legal advice. It was drafted to meet the specific needs and priorities of a particular set of circumstances. No opinion is expressed or implied as to the advisability of your relying on this document, and no liability, duty, or responsibility arises in respect of it; and likewise, no representation or warranty arises in respect of its accuracy, reliability or completeness

ACKNOWLEDGEMENTS

The International Humanitarian Infrastructure Platform (IHIP) extends special thanks to the following members of its Wash Contract Committee:

- Laurence Hamai, Public Health Engineer - HSP at Oxfam Global Humanitarian
- John Heelham, WASH Engineering Advisor at Concern Worldwide
- Baptiste Lecuyot, Water, Hygiene and Sanitation Coordinator - Emergency Response Team – Solidarités International
- Timothee Le Guellec, Water and Sanitation Technical Advisor - Premiere Urgence Internationale
- Liz Palmer, Global Construction Lead at Save the Children International
- Pavlos Tamvakis, Head of Construction - ICRC Water & Habitat
- Ephrem Paulos Woldebirhan, WASH Technical Advisor - Crisis Response at FHI 360
- Richard Dewhurst, Doctoral Researcher at Loughborough University
- François Baillon, IHIP managing director

IHIP would like to thank Save the Children International and Oxfam for sharing their construction contract templates with IHIP Wash Contract Committee.

IHIP would like to thank the Global Wash Cluster coordination team and its members which played a major role to identify issues to be addressed in this document.

Summary

Clause 1 - « General Provisions »	3
Clause 1.3 - « Priority of Documents »	3
Clause 3 - « Employer’s Representatives »	3
Clause 3.2 - « Employer’s Representative »	3
Clause 4 - « The Contractor »	3
Clause 4.3 - « Subcontracting »	3
Clause 4.5 - (Additional) « Progress Reports »	4
Clause 4.6 - (Additional) « Unforeseeable Physical Conditions »	4
Clause 4.7 - (Additional) « Terrorism and Prohibited Parties »	5
Clause 7 - « Time for completion »	5
Clause 7.5 - (Additional) « Suspension of Work »	5
Clause 9 - « Remedying Defects »	5
Clause 9.3 - (Additional) « Works to be measured »	5
Clause 11 - « CONTRACT PRICE AND PAYMENT »	6
Clause 11.2 - « Monthly Statements »	6
Clause 11.3 - « Interim Payments »	6
Clause 11.4 - « Payment of First Half of Retention »	6
Clause 11.5 - « Payment of Second Half of Retention »	6
Clause 11.6 - « Final Payment »	6
Clause 11.7 - « Currency »	6
Clause 11.9 - (Additional) « Advance payment »	7
Clause 11.10 - (Additional) « Retention Money »	7
Clause 12 - « Default »	7
Clause 12.5 - (Additional) « Termination by Employer »	7
Clause 13 - « Risk and Responsibility »	8
Clause 13.3 - (Additional) « Site Safety »	8
Clause 13.4 - (Additional) « Sexual Exploitation and Abuse »	8
Clause 15 - « Resolution of disputes »	9
Clause 15.4 - (Additional) « Dispute Avoidance »	9

Clause 1 - « General Provisions »

Clause 1.3 - « Priority of Documents »

Replace Clause (1.3) with the following:

“The documents forming the Contract are to be taken as mutually explanatory of one another. If an ambiguity or discrepancy is found in the documents, the Employer shall issue any necessary instructions to the Contractor, and the priority of the documents shall be as follows:

- (a) The Agreement,
- (b) The Contract Data,
- (c) These Conditions of Contract,
- (d) The Employer’s Policies,
- (e) The Scope of Works,
- (f) The Specifications,
- (g) The Drawings,
- (h) The Payment Milestones (if applicable), and
- (i) The Bill of Quantities.

such ambiguity, discrepancy or inconsistency shall be resolved by the relevant terms of the document appearing first in the list set out in this Sub-Clause 1.3 prevailing over the relevant terms of those documents appearing later in that list.”

Clause 3 - « Employer’s Representatives »

Clause 3.2 - « Employer’s Representative »

Replace Clause (3.2) with the following:

"The Employer may also appoint a firm, or a third party representative, or individual to carry out certain duties. The appointee may be named in the Appendix, or notified by the Employer to the Contractor from time to time. The Employer shall notify the Contractor of the delegated duties and authority of this Employer's representative.”

Clause 4 - « The Contractor »

Clause 4.3 - « Subcontracting »

Replace Clause (4.3) with the following:

“The Contractor shall not subcontract the whole of the Works. The Contractor shall not subcontract any part of the Works without prior written consent of the Employer The Contractor shall be responsible for the acts or defaults of his subcontractors, his agents, his

employees, his other suppliers or third parties, as if they were acts or defaults of the Contractor.

Only one level of subcontracting will be accepted. The Contractor shall contractually impose the obligation to his subcontractors to not conclude any more subcontracts. “

Clause 4.5 - (Additional) « Progress Reports »

Unless otherwise stated in the Particular Conditions, monthly progress reports shall be prepared by the Contractor and submitted to the Employer. The first report shall cover the period up to the end of the first calendar month following the Commencement Date. Reports shall be submitted monthly thereafter, each within 7 days after the last day of the period to which it relates.

Reporting shall continue until the Contractor has completed all work which is known to be outstanding at the completion date stated in the Taking-Over Notice for the Works.

Any requirements to be included in the reports should be mentioned in the scope of works.

Clause 4.6 - (Additional) « Unforeseeable Physical Conditions »

In this Sub-Clause, “physical conditions” means natural physical conditions and man-made and other physical obstructions and pollutants, which the Contractor encounters at the Site when executing the Works, including sub-surface and hydro-logical conditions but excluding climatic conditions.

If the Contractor encounters adverse physical conditions which he considers to have been Unforeseeable, the Contractor shall give notice to the Employer as soon as practicable.

This notice shall describe the physical conditions, so that they can be inspected by the Employer, and shall set out the reasons why the Contractor considers them to be Unforeseeable. The Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions, and shall comply with any instructions which the Employer may give. If an instruction constitutes a Variation, Clause 10 [Variations and Claims] shall apply.

If and to the extent that the Contractor encounters physical conditions which are Unforeseeable, gives such a notice, and suffers delay and/or incurs Cost due to these conditions, the Contractor shall be entitled subject to Sub-Clause 10.5 [Variation and Claim Procedure] to:

- (a) An extension of time for any such delay, if completion is or will be delayed, and
- (b) Payment of any such Cost, which shall be included in the Contract Price.

The Employer may take account of any evidence of the physical conditions foreseen by the Contractor when submitting the Tender, which may be made available by the Contractor, but shall not be bound by any such evidence.

Clause 4.7 - (Additional) « Terrorism and Prohibited Parties »

The Contractor and the Contractor's Third Parties shall not in any way:

- (i) Engage in transactions with, or provide resources or support to armed groups, individuals and entities which are sanctioned, or individuals and organizations associated with terrorism or otherwise be involved directly or indirectly with terrorism; or
- (ii) Be involved directly or indirectly in the manufacture or sale of arms; or
- (iii) Have any business relations with governments for any war related purpose.

Clause 7 - « Time for completion »

Clause 7.5 - (Additional) « Suspension of Work »

The Employer may at any time instruct the Contractor to suspend progress of part or all of the Works. During such suspension, the Contractor shall protect, store and secure such part or the Works against any deterioration, loss or damage.

If the Contractor suffers delay and/or incurs Cost from complying with the Employer's instructions and/or from resuming the work, the Contractor shall give notice to the Employer and shall be entitled subject to Clause 10 [Variations and Claims] to:

- a) An extension of time for any such delay, if completion is or will be delayed, and
- b) Payment of any such Cost, which shall be included in the Contract Price.

The Contractor shall not be entitled to an extension of time for, or to payment of the Cost incurred in, making good the consequences of the Contractor's faulty design, workmanship or materials, or of the Contractor's failure to protect, store or secure in accordance with this Sub-Clause 7.5 [Suspension of Work].

If the suspension has been continuous for more than 120 days, the Contractor may request the Employer's permission to proceed. If the Employer does not give permission within 28 days after being requested to do so, the Contractor may, by giving notice to the Employer treat the suspension as an omission under Clause 10 [Variations and Claims] of the affected part of the Works.

If the suspension affects the whole of the Works, the Contractor may by notice terminate the Contract immediately.

Clause 9 - « Remedying Defects »

Clause 9.3 - (Additional) « Works to be measured »

The Works shall be measured, and valued for payment, in accordance with this Clause.

Whenever the Employer requires any part of the Works to be measured, at least 7 days' notice shall be given to the Contractor, who shall:

- (a) Promptly either attend or send another qualified representative to assist the Employer in making the measurement, and
- (b) Supply any particulars requested by the Employer.

If the Contractor fails to attend or send a representative, the measurement made by (or on behalf of) the Employer shall be accepted as accurate.

Clause 11 - « CONTRACT PRICE AND PAYMENT »

Preparation Notes: In the case installment payments is preferred to Monthly payments use the sub-clauses (11.2 11.3 11.4 11.5 11.6) below otherwise delete them:

Clause 11.2 - « Monthly Statements »

The standard article is deleted.

Clause 11.3 - « Interim Payments »

Replace Clause (11.3) with the following:

“Within 14 days of delivery of each invoice, the Employer shall pay to the Contractor the amounts shown below, less any amount for which the Employer has specified his reasons for disagreement. Payments will be made as follows:

- XX % of the contract amount, advance payment, shall be paid upon mobilization to the Site
- XX% of the total contract amount only shall be paid upon total completion of the works, as per Sub-Clause 8.1, and upon a receipt of an invoice
- XX% of the total contract amount only shall be paid upon Taking-Over Notice notified by the Employer as per Sub-Clause 8.2, and upon a receipt of an invoice, subject to Clause 9
- XX% of the contract amount only shall be paid by the Employer to the Contractor subject to the remedying of defects as specified in sub-clause 9.1, and the length specified in the appendix.”

Clause 11.4 - « Payment of First Half of Retention »

The standard article is deleted.

Clause 11.5 - « Payment of Second Half of Retention »

The standard article is deleted.

Clause 11.6 - « Final Payment »

The standard article is deleted.

Clause 11.7 - « Currency »

Replace Clause (11.7) with the following:

“Payment shall be in the currency stated in the Appendix.

If the Contract provides for payment of the Contract Price in more than one currency, then whenever an adjustment is agreed, approved or determined, the amount payable in each of

the applicable currencies shall be specified. For this purpose, reference shall be made to the actual or expected currency proportions of the Cost of the varied work, and to the proportions of various currencies specified for payment of the Contract Price.”

Clause 11.9 - (Additional) « Advance payment »

The contractor can ask for advance payment before the beginning of the works, which should be less than 30% of the total price of the works. When the local banking system allows it, the Employer should get in return the equivalent of the total amount of the agreed advance payment made available through a bank certified check. This bank certified check should be returned to the bank once the works corresponding to the amount of the advance payment have been completed by the contractor.

Clause 11.10 - (Additional) « Retention Money »

When the local banking system allows it, the Retention should be made available to the Employer through a bank certified check from the contractor.

Clause 12 - « Default »

Clause 12.5 - (Additional) « Termination by Employer »

If the totality of the funding of the works comes from a donor conditioning the funding of the work to a specific deadline, the Employer shall be entitled to terminate the Contract if the donor’s funding is not available to continue the work after this deadline has been met.

The Employer shall be entitled to terminate the Contract if the Contractor:

- (a) Abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,
- (b) Subcontracts the whole of the Works or assigns the Contract without the required agreement,
- (c) Gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:
 - (i) For doing or forbearing to do any action in relation to the Contract, or
 - (ii) For showing or forbearing to show favor or disfavor to any person in relation to the Contract,or if any of the Contractor’s Personnel, agents or Subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (c). However, lawful inducements and rewards to Contractor’s Personnel shall not entitle termination,
- (d) If the contractor does not respect Sub-Clause 13.4 [Sexual Exploitation and Abuse],
- (e) If the contractor does not respect binding items of the Employer’s policy.

In any of these events or circumstances, the Employer may, upon giving 21 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site. However, in the case of sub-paragraph (c), the Employer may by notice terminate the Contract immediately.

The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise.

The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for him, to the Employer. However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works as describes under Sub-Clause 13.3 [Site Safety].

Remedying to any unsolved situation at this point should be managed under Sub-Clause 15.4 [Dispute Avoidance].

Clause 13 - « Risk and Responsibility »

Clause 13.3 - (Additional) « Site Safety »

The Contractor shall ensure that both it and the Contractor's Third Parties at all times take all steps reasonably necessary to maintain the health and safety of those performing services on the Site in connection with the Works. The Contractor shall ensure that it maintains First Aid equipment on Site in-line with the local medical standards of the Country. The Contractor shall appoint a designated person to act as an accident prevention officer at the Site and agrees to ensure that such person proactively maintains safety and seeks to prevent accidents wherever possible.

The Contractor shall:

- (a) Comply with all applicable safety regulations,
- (b) Take care for the safety of all persons on the Site,
- (c) Use reasonable efforts to keep the Site and Works clear of unnecessary obstruction so as to avoid danger to all persons, and
- (d) Provide fencing, lighting, guarding and watching of the Works until completion and taking over under Clause 8 [Taking-Over].

Clause 13.4 - (Additional) « Sexual Exploitation and Abuse »

The Contractor must take all appropriate measures to prevent and sanction sexual exploitation or abuse of anyone by the Contractor's Personnel. For these purposes, sexual exploitation and abuse is understood as abuse of authority, trust or a situation of vulnerability for sexual ends in exchange for money, work, Goods or services.

The Employer may, after giving 14 days' notice to the Contractor, terminate the Contract and expel him from the Site, and the provisions of Clause 12 shall apply as if such termination had been made under Sub-Clause 12.1 [Default by Contractor].

Clause 15 - « Resolution of disputes »

Clause 15.4 - (Additional) « Dispute Avoidance »

15.4.1. On the occurrence of a dispute between the Parties under the Contract which cannot be solved in the ordinary course of business, the following procedure must be followed:

15.4.1.1. Either Party shall call a management meeting on at least five (5) days written notice;

15.4.1.2. An authorized Senior Representative from each Party must be present at this management meeting and any follow-up meetings;

15.4.1.3. Those attending the meeting shall in good faith and acting reasonably seek to resolve the dispute that has arisen within ten (10) days of the management meeting;

15.4.1.4. If the Parties fail to resolve the dispute within ten (10) days of the management meeting, each Party may, by giving written notice to the other, refer the matter to the senior executive of each Party who shall cooperate in good faith to resolve the dispute within ten (10) days of the dispute being referred to them; and

15.4.1.5. In the event that the people nominated under Sub-Clause 15.4.1.4 are unable to resolve the dispute within ten (10) days of the dispute being referred to them, or either Party fails to procure such person to try and resolve the dispute, the Employer could refer the matter to the donor's representative who shall cooperate in good faith to resolve the dispute within ten (10) days of the dispute being referred to him; and

15.4.1.6. In the event that the people nominated under Sub-Clause 15.4.1.5 are unable to resolve the dispute within ten (10) days of the dispute being referred to them, or either Party fails to procure such person to try and resolve the dispute, then either Party shall be entitled to refer the dispute for resolution in accordance with Sub-Clause 15.4.2.

15.4.2. Each Party should call Sub-Clause 15.1 [Adjudication] and if not applicable irrevocably agrees that the courts of the Country shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with the Contract or its subject matter. Each Party irrevocably submits to the jurisdiction of the courts of the Country.