



**FUSION
FOR
ENERGY**

11th ILO meeting

ILOs' questions transmitted before meeting

15th April 2011 - Barcelona

Contracts (1/9)



Contractual conditions in general (UK ILO)

- Are we still dealing with the questions relating to the three topics or does F4E considered these issues resolved?
- How is F4E planning to resolve any issues that were not discussed at the legal meeting last June?

F4E answer:

- F4E legal group will submit to the EXCO the propositions of modifications of contractual conditions. It might be analysed at September EXCO.

Contracts (2/9)



Limit of liability (NL ILO)

ILOs comment: A comprehensive limit of liability is required so that the limit applies to all liabilities other than those that cannot be capped or excluded under law. Recent F4E conditions have included a partial limit but this has had a number of exclusions where the limit does not apply.

F4E answer:

- Contractual liability is clearly capped. There are certain few and defined exceptions to which the liability case does not apply. These are:
 - (a) damage or loss caused by the gross negligence or wilful misconduct of Contractor, its employees or agents, or of any subcontractor or its employees or agents;
 - (b) personal injuries or death ;
 - (c) damage or loss directly resulting from non-compliance with an applicable law or from an infringement of intellectual property rights of a third party; as stipulated in Article [1.4] below.
- The Contractor shall be responsible for and shall indemnify Fusion for Energy, without any limitation as to the amount, in the event of any action, claim or proceeding brought against Fusion for Energy by a third party as a result of damage caused by the Contractor during the execution of this Contract until Final Acceptance.
- In the event of any action brought by a third party against Fusion for Energy in connection with the performance of this Contract, the Contractor shall, upon request, promptly and fully assist Fusion for Energy.
- The ITER Organisation does not qualify as a third party for the purposes of this Article 1.4 unless the damage or loss suffered by the ITER Organisation was caused by the Contractor's wilful misconduct or gross negligence.

Indirect & Consequential Damages (NL ILOs)

ILOs comment: The list of 'heads of loss' needs to be comprehensive and the damages must 'arise out of or relate to performance or non-performance of the Contract'. The current wording is quite general and does not list the heads of loss such as loss of profit, loss of business, loss of contracts etc.

F4E answer

- As a policy, F4E has decided to keep consequential damages to the extent they are enforceable under the applicable law to the contract. However, in case of negotiations on a case by case basis, F4E can decide to exclude them in counterpart of something else.



Nuclear indemnity (NL ILO)

ILOs comment: Nuclear Indemnity – F4E should provide a nuclear indemnity. This will become more of an issue as the concept design is further developed and construction becomes a reality. A recent draft contract did include an indemnity but this was provided by ITER. Industry needs to understand how this indemnity will apply when they have no contractual link to ITER.

F4E answer

- This issue is solved. ITER IO provides a declaration of indemnity directly to the contractor. It is an unilateral declaration of IO to the contractor and as such enforceable under French Law. This declaration is attached to the contract. Companies have already signed contracts with F4E and IO and are happy with it.

Standard of care (NL ILOs)

ILOs comment: 'highest professional standards' is difficult to define and could be interpreted as being without limit. An appropriate alternative would be; *"The Contractor shall perform the services with the standard of care, skill and diligence expected, at the time and place of performance, of recognized professional engineering firms performing services of a similar type and nature."*

F4E answer

- Reference to the highest professional standard will be removed. A clause similar to the one above will be included in the revised model contract.

Contracts (6/9)



Indemnities (NL ILO)

ILOs comment: There are a number of indemnities in the contracts which are too open such as the Articles relating to third party actions. The contractors liability needs to be limited to negligent acts only.

F4E answer

Indemnity with respect to third party actions is not negotiable. Liability can be enforced only in case of negligence, since the damage must be caused by the Contractor (see above clause)



Liquidated Damages (NL ILO)

ILO comment: Where LD's apply these should be the sole remedy for delay. Recent F4E contracts have included LD's along with an explicit statement that this is not the sole remedy. Extracts from an example clause included in a recent contract are as follows:

- *“The Parties expressly agree that time, milestones and deadlines under this Contract are of essence and, therefore, any delay on the performance of the Contractor’s obligations shall result in significant damage for Fusion for Energy. Should the Contractor fail to perform his obligations under the Contract within the time limits set by the Contract, Fusion for Energy may decide to impose liquidated damages for delay, without prejudice to Fusion for Energy’s right to claim damage and terminate the Contract and in addition to the liability incurred in relation to the Contract for any breach of its obligations hereunder.*
- *The liquidated damages of up to **% of the total amount of the Contract per calendar week of delay, up to a maximum of **% of the total amount of the Contract. The Parties expressly agree that until the cap of **% is reached, Fusion for Energy may not claim any other damage due to delay other than the liquidated damages. Should the cap be reached, the amount of liquidated damages paid by the Supplier is without prejudice to any further and additional damage to Fusion for Energy arising, directly or indirectly as a result of any additional delay in the performance of the Contract on the part of the Supplier. A delay in the performance of the Contract not caused by the Contractor is not subject to liquidated damages.”*

F4E answer:

- Generally, liquidated damages are the sole remedy for delay. Without the reference of the contract referred to in the remark, it is not possible to provide an explanation of the reason underlying the presence of this clause in the quotation.

Termination

ILO comment: The client termination and recovery rights are onerous and should be modified to allow for re-performance before termination. Many of the reasons for termination are subjective (in the opinion of the client). F4E can as a consequence of termination claim compensation and recover any damages suffered. This must be qualified so that it does not apply where the contractor is not at fault.

F4E answer:

- Damage suffered under the termination clause is subject to the general limits of the article on liability. Subjectivity has been removed.



Export Licence

ILO comment: The latest contracts (F4E & ITER) have explicitly made the contractor responsible for the provision of any required export licenses. This is not within the control of the contractor as it is a government decision as to the timing and whether or not to grant a license.

F4E answer

- This is the general policy of F4E on export control. The Contractor has to ask the license to its national authority because it knows it better than F4E. In any case, the lack of authorization on the part of the national authority is treated now as a case of force majeure.

IIO question:

- Update of Excel table on forthcoming calls?
- Would it be possible that F4E publishes on its Portal the list of Grants awarded in 2010 (2008 and 2009 are already on line)?

F4E answer

- Yes, the Excel table and the list of grants (ready) will be updated and published.

Would it be possible that F4E spreads to ILOs:

- The names of European companies having expressed their interest to F4E for I.O C4N (it is very useful when a company is looking for a partner to answer I.O's Prequalification questionnaire.). (It seems some French companies have no feedback to know if F4E did, or not, receive their candidature and transmit it to IO: is it systematically done?)

F4E answer

- BI requests the question to be more specified and discussed at ILO meeting.

Would it be possible that F4E gets from IO and spreads to us:

- The names of European companies pre-qualified by IO on the last C4N,
- The names of the winners (European at least)?

F4E answer

- On these two points, as reminded at 10th ILO, the process agreed with IO in July 2010 in presence of ILOs, is that ILOs or companies ask the information to Martha Labrevoir from IO.

In any case, F4E considers that if a company expresses its wish to find partner, F4E will immediately inform ILOs; however a list of bidding companies cannot be transmitted.