

## ***INDUSTRIAL WORKS CONTRACT***

### Introduction

The American firm, U.S. Machinery Corp., makes the equipment for various kinds of food-processing plants that can or freeze fruits and vegetables for shipment to markets, often distant ones. The firm usually assembles the equipment, transports it to the site and installs it there. It has not previously done business outside of the United States but it has been attracted by the possibilities of expanding its operations into potentially lucrative markets elsewhere. The intending purchaser in this case is National Fruit, a state trading agency established by the Government of Honduras. National Fruit was established in the hope that it could find a way through which Honduras fruits which grow in great profusion could be brought into the international market. Honduras also hopes for other things from the project, including the training of a significant addition to its supply of skilled labor and the encouraging of a more market-oriented attitude on the part of its farmers who have oriented their work strictly towards their own subsistence and a few sales to local buyers. National Fruit has indicated to U.S. Machinery that it will tentatively accept the latter's offer to build a plant.

What follows is a form contract for the building of an industrial plant. General Conditions for the Erection of Plant and Machinery Abroad, No. 574d (prepared by the Secretariat Of The United Nations Economic Commission For Europe Geneva). Since these guidelines were produced in the 1960s and 70s, UNCITRAL has completed a Legal Guide on Drawing Up International Contracts for Construction of Industrial Works. Review the Handout on Industrial Works and answer these questions following each section. Given the answers to those questions, review this form contract. Then attempt to answer the questions which follow.

#### 1. PREAMBLE

1.1 These general conditions shall apply if the parties refer to them in their contract, save as varied by express agreement accepted in writing by both parties.

1.2 In these general conditions the expression "erection of plant and machinery abroad" relates to the following cases:

(a) the case of contract whereby an undertaking or consortium of undertakings (referred to in these general conditions as the "client"), having entered into a comprehensive agreement for the supply and erection of plant and machinery, sub-contracts the erection or part of the erection to another undertaking (referred to in these general conditions as the "erector");

(b) the case of a contract by which a works owner (referred to in these general conditions as the "client") wishes to have plant and machinery which he has bought elsewhere erected by an erector;



(c) the case of a contract whereby an erection undertaking contracts to erect plant and machinery manufactured by the client himself.

1.3 These general conditions shall not apply to erection contracts other than those referred to in paragraph 2 hereof or to operations connected with the erection contract, such as surveying contracts or contracts for the management or supervision of the work.

## 2. FORMATION OF CONTRACT

2.1 The contract shall be deemed to have been entered into when, upon receipt of a firm offer from one of the parties, the other party has sent an acceptance in writing within the time limit (if any) fixed by the first party.

## 3. DRAWINGS AND DESCRIPTIVE DOCUMENTS

3.1 The client shall furnish free of charge to the erector, before the commencement of the work, any information, plans or drawings required for erection. Such plans, drawings and documents may not be reproduced or copied, nor may they be transmitted or communicated to third parties.

3.2 If the information, plans or drawings required for the erection have not been furnished to the erector, or, if they do not contain the necessary details, the erector shall himself prepare such plans or drawings and shall submit them to the client for approval. The plans and drawings so approved shall become the specifications for the erection of the plant.

## 4. LOCAL LAWS AND REGULATIONS

4.1 Unless the erector is an undertaking established in the country in which the erection is to take place, the client shall inform the erector fully, and not later than at the time of the conclusion of the contract, of the local laws and regulations applicable to the erection and to the taxes and dues chargeable in connection therewith.

4.2 If, in consequence of any change in the said laws and regulations which occur after the date of the formation of the contract, the cost of the erection is increased or reduced, the amount of the increase or reduction) shall be added to or deducted from the price, as the case may be.

## 5. WORKING CONDITIONS

5.1 Unless the client has informed the erector to the contrary, the price for the erection shall be deemed to have been agreed upon on the assumption that the following conditions are fulfilled:

(a) the erection will not be carried out in unhealthy or dangerous sites;

(b) the erector's employees will be able to obtain suitable and convenient board and lodging in the neighborhood of the site and have access to adequate medical services;

(c) such equipment, consumable stores, water and power as are specified in the contract will be available to the erector on the site in good time and, except as otherwise agreed, free of charge to the erector;

(d) the client will provide the erector (free of charge, unless otherwise agreed) with closed or guarded premises on or near the site as a protection against the theft and deterioration of the plant to be erected, of the tools and equipment required therefor, and of the clothing of the erector's employees;

(e) the erector will not be required to undertake any construction or demolition work, or to take any other unusual measures for moving the plant from the point of unloading to the point on the site where it is to be erected.

Any departure from the conditions mentioned in this paragraph shall attract an extra charge.

## 6. ERECTION ON A COST-REIMBURSABLE AND LUMP-SUM BASIS

6.1 If the erection is carried out on a cost-reimbursable basis, the following items shall be charged separately;

(a) all traveling expenses incurred by the erector in respect of his employees and the transport of their equipment and personal effects (within reasonable limits) in accordance with the specified method and class of travel where these are specified in the contract;

(b) the living expenses, including any appropriate allowances, of the erector's employees for each day's absence from their homes, including non-working days and holidays;

(c) the time worked, which shall be calculated by reference to the number of hours certified as worked in the time-sheets signed by the client. Overtime and work on Sundays, holidays and at night will be charged at the special rates mentioned in the contract. Save as otherwise provided, the hourly rates cover the wear and tear and depreciation of the erector's tools and light equipment;

(d) time necessarily spent on:

(i) preparation and formalities incidental to the outward and homeward journeys;

(ii) the outward-and homeward joumeys;

(iii) daily travel morning and evening between lodgings and the site if it exceeds half an hour and there are no suitable lodgings closer to the site;

(iv) waiting when work is prevented by circumstances for which the erector is not responsible under the contract;

(e) any expenses incurred by the erector in accordance with the contract, in connexion with the provision of equipment by him, including where appropriate a charge for the use of the erector's own heavy equipment;

(f) any taxes or dues levied on the invoice and paid by the erector in the country where erection takes place.

6.2 If the erection is carried out for a lump sum, the quoted price includes all the items above mentioned. Nevertheless, if the erection is prolonged for any cause for which the client or any of his contractors other than the erector is responsible and if as a result the work of the erector's employees is suspended or added to, a charge will be made for any idle time, any extra work, any extra living expenses of the erector's employees and the cost of any extra journey.

## 7. PREPARATORY WORK

7.1 The plant must be on the site in good time. The client must provide, in good time, suitable access to the site for the plant and all necessary equipment and furnish the erector with all information required for making all necessary connexions to the plant.

7.2 If the client is responsible for all preparatory work, it must be completed in good time.

7.3 If the erector is responsible for the foundations work, the client shall furnish him in good time with all necessary information-relating, unless otherwise agreed, only to the work-for preparing suitable foundations. Any expenses resulting from an error or omission in the information furnished by the client shall be borne by the client.

## 8. LIAISON AGENTS

8.1 The erector and the client shall each designate in writing a competent representative to be his channel of communication with the other party on the day-to-day execution of the work on the site.

8.2 Each such representative shall be present on or near the site during working hours.

## 9. ADDITIONAL LABOUR

9.1 If the erector so requires in good time, the client shall make available to the erector free of charge such skilled and unskilled labour as is provided for in the contract and, within reasonable limits, any additional unskilled labour required, even if not provided for in the contract.

## 10. SAFETY REGULATIONS

10.1 The client shall notify the erector in full of the safety regulations which the client imposes on his own employees and the erector shall secure the observance by his employees of such safety regulations.

10.2 If breaches of these regulations come to the notice of the client, he shall inform the erector in writing forthwith, and may forbid persons guilty of such breaches entry to the site.

10.3 Each party shall inform the other in full of any special dangers which the execution of the work may entail.

## 11. OVERTIME

11.1 Any overtime and the conditions thereof shall, within the limits of the laws and regulations of the erector's country and of the country in which the erection is carried out, be as agreed between the parties.

## 12. WORK OUTSIDE THE CONTRACT

12.1 The client shall not be entitled to use the erector's employees on any work unconnected with the subject-matter of the contract without the previous consent of the erector. If the erector so consents, he shall not be under any liability in respect of such work, and the client shall be responsible for the safety of the erector's employees while employed on such work.

## 13. RIGHT OF INSPECTION

13.1 Until the work is taken over and during any work resulting from the operation of the guarantee, the erector shall have the right at any time during the hours of work on the site to inspect the work at his own expense. In proceeding to the site, the inspectors shall observe the regulations as to movement in force on the client's premises.

13.2 Any person duly authorized by the client shall also have the right to inspect the work during working hours, provided that such inspection shall entail no expense for the erector.

## 14. DELIVERY AND COMPLETION

14.1 Unless otherwise agreed, the completion period shall run from the most recent of

the following dates:

- (a) the date of the formation of the contract as defined in clause 2;
- (b) the date on which the erector receives notice of the grant of an authorization for the entry of his personnel, if such authorization is required in the country of erection;
- (c) the date on which the erector receives notice of the grant of an authorization for the import of equipment necessary for the erection;
- (d) the date of the receipt by the erector of such payment in advance of erection as is stipulated in the contract.

14.2 Should delay in completion be caused by any of the circumstances mentioned in clause 20 or by an act or omission on the part of the client and whether such cause occur before or after the time or extended time for completion, there shall be granted, subject to the provisions of paragraph 5 hereof, such extension of the completion period as is reasonable having regard to all the circumstances of the case.

14.3 If a fixed time for completion is provided for in the contract, and the erector fails to complete the work within such time or any extension thereof granted under paragraph 2 hereof, the client shall be entitled, on giving to the erector within a reasonable time notice in writing, to claim a reduction in the price payable under the contract, unless it can be reasonably concluded from the circumstances of the particular case that the client has suffered no loss. Such reduction shall be equal to the percentage, specified in paragraph A of the Appendix, of the price payable under the contract for the erection of such part of the works as could not be put to the use intended owing to delay in completion. It shall be calculated for each complete week of delay commencing on the due date of completion but shall not exceed the sum named in paragraph B of the Appendix or, if no sum is specified, 75 per cent of the price payable under the contract for the erection of such part of the plant as cannot be used as intended owing to delay in completion. Such reduction shall be allowed when a payment becomes due on or after completion. Save as provided in paragraph 5 hereof, the said reduction shall be to the exclusion of any other remedy of the client in respect of the erector's failure to complete as aforesaid.

14.4 If the time for completion mentioned in the contract is an estimate only, either party may after the expiration of two-thirds of such estimated time require the other party in writing to agree a fixed time.

If the parties fail to agree, either party may have recourse to arbitration, in accordance with the provisions of clause 23, to determine a reasonable time for completion and the time so determined shall be deemed to be the fixed time for completion provided for in the contract and paragraph 3 hereof shall apply accordingly.

14.5 If any portion of the work in respect of which the client has become entitled to the maximum reduction provided for in paragraph 3 hereof, or in respect of which he would have

been so entitled had he given the notice referred to therein, remains uncompleted, the client may by notice in writing to the erector require him to complete and by such last-mentioned notice fix a final time for completion which shall be reasonable taking into account such delay as has already occurred. If for any cause other than one for which the client or some other supplier, contractor, builder or erector employed by him is responsible, the erector fails to complete within such time, the client shall be entitled by notice in writing to the erector, and without requiring the consent of any court, to terminate the contract in respect of such portion of the work and thereupon to recover from the erector any loss suffered by the client by reason of the failure of the erector as aforesaid up to an amount not exceeding the sum named in Paragraph C of the Appendix or, if no sum is specified, up to 75 per cent of the price payable under the contract for the erection of such part of the plant as cannot be used as intended owing to delay in completion.

## 15. PAYMENT

15.1 Payment shall be made in the manner and at the time or times agreed by the parties.

15.2 Payments made on account by the client shall be applied against the price of the work ordered and shall not constitute deposits the renunciation of which would entitle the parties to terminate the contract.

15.3 A payment conditional on the fulfilment of an obligation by the erector shall not be due until such obligation has been fulfilled, unless the failure of the erector is due to an act or omission on the part of the client.

15.4 If the client delays in making any payment, the erector may postpone the fulfilment of his own obligations until such payment is made, unless the failure of the client is due to an act or omission of the erector .

15.5 If the client's delay in making any payment is due to one of the circumstances mentioned in clause 20, the erector shall not be entitled to any interest on the sum due.

15.6 Save as aforesaid, if the client delays in making any payment, the erector shall on giving to the client within a reasonable time notice in writing be entitled to the payment of interest on the sum due at the rate fixed in paragraph D of the Appendix from the date on which such sum became due. If at the end of the period fixed in paragraph E of the Appendix the client has not paid the sum due, the erector shall be entitled by notice in writing to the client, and without requiring the consent of any court, to terminate the contract and thereupon to recover from the client the amount of his loss up to the sum mentioned in paragraph F of the Appendix.

## 16. ACCEPTANCE OF BUILDING

16.1 The erector shall notify the client in writing when the work will be ready for acceptance and such notification shall be given in sufficient time to enable the client to make any necessary arrangements. The date of the acceptance shall be fixed by agreement between the

erector and the client. The tests shall take place in the presence of both parties.

16.2 If expressly agreed in the contract, the acceptance will include tests which may be carried out separately or at the same time as tests for taking over the plant as a whole.

16.3 If in the course of the acceptance or of the taking-over tests it is found that the work is defective as a result of defective mounting, assembly or connexion of the plant supplied to the erector, the erector shall with all speed and at his own expense make good the defects and thereafter, if the client so requires, the acceptance and/or the tests shall be repeated at the expense of the erector.

## 17. TAKING-OVER OF THE BUILDING

17.1 As soon as the work has been completed in accordance with the contract and has been accepted without any defect for which the erector is responsible having been found, the client shall be deemed to have taken over the work so far as the erector is concerned and the guarantee period shall start to run. The client shall thereupon issue a certificate (herein called a "taking-over certificate") in which he shall certify the date on which the work was completed and passed the tests.

17.2 If the client does not take the steps necessary for the acceptance, the work shall be deemed to have been taken over and the guarantee period shall start to run on a written notice to that effect being given by the erector.

17.3 If by reason of difficulties encountered by the client (whether or not covered by clause 20) it becomes impossible to proceed to the acceptance, it shall be postponed for a period not exceeding six months, or such other period as the parties agree.

## 18. GUARANTEE

18.1 The erector undertakes to remedy at his expense and with all speed, subject to the provisions set out below, any defect in the mounting, assembly, or connexion of plant furnished to him. If, owing to such defects, parts used in the erection are rendered defective, the erector shall also reimburse the client's expenses in respect of the replacement or repair of the defective parts, up to the sum named in paragraph G of the Appendix or, if no sum is specified, up to the agreed price of the erection.

18.2 The erector's undertaking under paragraph 18.1 is limited to defects which appear during the period (hereinafter called "the guarantee period") specified in paragraph H of the Appendix and commencing on taking over.

18.3 In order to be able to avail himself of his rights under this clause the client shall notify the erector in writing without delay of any defects that have appeared and shall give him every opportunity of inspecting and remedying them.

18.4 If the erector refuses to fulfill his obligations under this clause or fails to proceed with due diligence after being required so to do, the client may proceed to do the necessary work at the erector's risk and expense, provided that he does so in a reasonable manner.

18.5 The erector's liability does not cover defects arising either out of plant erected, or out of a design imposed or modified by the client.

18.6 After taking over and save as in this clause expressed, the erector shall be under no liability even in respect of defects due to causes existing before taking over. It is expressly agreed that the client shall have no claim in respect of personal injury or of damage to property not the subject matter of the contract arising after taking over nor for loss of profit unless it is shown from the circumstances of the case that the erector has been guilty of gross misconduct.

18.7 "Gross misconduct" does not comprise any and every lack of proper care or skill, but means an act or omission on the part of the erector implying either a failure to pay due regard to serious consequences which a conscientious erector would normally foresee as likely to ensue, or a deliberate disregard of any consequences of such act or omission.

## 19. PASSING OF RISK

19.1 In the event of personal injury or damage to property occurring before all the work has been taken over, the erector's liabilities shall be determined as follows:

(a) The erector shall at his own expense make good any loss or damage to the erected plant during the execution of the work if such loss or damage is caused by an act or omission of the erector;

(b) In respect of damage to the client's property other than the erected plant, the erector shall indemnify the client to the extent that such damage was caused by the erector or by the failure of equipment or tools provided by the erector for the purposes of erection, if the circumstances show that the erector failed to use proper skill and care.

(c)(i) In respect of personal injury, the respective liabilities of the client and of the erector towards the injured person shall be governed by the law of the country where the injury occurred;

(ii) If the injured person brings a claim against the client, the erector shall indemnify the client against such claim to the extent that the injury was due to any of the causes mentioned in subparagraph (b ) hereof;

(iii) If the injured person brings a claim against the erector, the client shall, to the extent permitted by the law of the country where the injury occurred, indemnify the erector against such claim save to the extent that, by the operation of sub-paragraph (c)(ii) hereof, the erector would have been liable to indemnify

the client had the claim been brought against the client.

(d) The provisions of this paragraph concerning the liability of the parties to the contract shall also apply to their respective employees. However, in the case of additional labour furnished by the client under paragraph 9.1, the erector shall be liable in respect of his orders and instructions if they were incorrect, badly expressed or given to a person deemed to be unqualified.

19.2 In order to avail himself of his rights under sub-paragraphs (c) and (d) of paragraph 19.1 the party against whom a claim is made must notify the other of such claim and must permit the other, if the other so wishes, to conduct all negotiations for the settlement of such claim and to act in his stead or, to the extent permitted by the law of the country where the action is brought, to join in such litigation.

19.3 The provisions of this clause shall apply equally while the erector is on the site in fulfilment of an obligation under clause 18.

## 20. HARDSHIP

20.1 Any circumstances beyond the control of the parties which supervene after the formation of the contract and which impede its performance under normal conditions shall be considered as causes of relief. Circumstances are deemed to be beyond the control of the parties, for the purposes of this clause, if they are not caused by some fault on the part of the party invoking them.

20.2 The party wishing to claim relief by reason of any of the said circumstances shall notify the other party in writing without delay of the occurrence and of the cessation of these circumstances.

20.3 The effects of the said circumstances, so far as they affect the timely performance of their obligations by the parties, are defined in clauses 14 and 15. Save as provided in paragraphs 14.5 and 15.6, if, by reason of any of the said circumstances, the performance of the contract within a reasonable time becomes impossible, either party shall be entitled to terminate the contract by notice in writing to the other party without requiring the consent of any court.

20.4 If the contract is terminated in accordance with paragraph 3 hereof, the division of the expenses incurred in respect of the contract shall be determined by agreement between the parties.

20.5 In default of agreement the arbitrator shall apportion the said expenses between the parties in such manner as to him seems fair and reasonable, having regard to all the circumstances of the case.

## 21. LIMITATION OF DAMAGES

21.1 Where either party is liable in damages to the other, these shall not exceed the damage which the party in default could reasonably have foreseen at the time of the formation of the contract.

21.2 The party who sets up a breach of contract shall be under a duty to take all necessary measures to mitigate the loss which has occurred provided that he can do so without unreasonable inconvenience or cost. Should he fail to do so, the party guilty of the breach may claim a reduction in the damages.

## 22. RIGHTS AT TERMINATION

22.1 Termination of the contract, from whatever cause arising, shall be without prejudice to the rights of the parties accrued under the contract up to the time of termination.

## 23. ARBITRATION AND LAW APPLICABLE

23.1 Any dispute arising out of or relating to the contract shall be finally settled by arbitration, without recourse to judicial proceedings, in accordance with the procedure agreed upon by the parties.

23.2 Unless otherwise agreed, the contract shall be governed by law of the country where the erection is carried out.

**Additional Reading:** The literature on international construction projects is specialized. There is a journal devoted to it—the International Construction Law Review. The most widely used form in the field is the Conditions of Contract for Work of Civil Engineering Construction produced by the International Federation of Consulting Engineers now in its Fourth Edition of 1987. For an interesting review of the problems use of that British-based form in the Middle East has caused, see Sarie-Eldin, Operation of FIDIC Civil Engineering Conditions in Egypt and Other Arab Middle Eastern Countries, 18 Int'l Law. 951 (1994). Various forms of contract are compared in Herzfeld & Hadley, Contracting and Subcontracting for Overseas Projects (1988). See also UNCITRAL, Legal Guide to Drawing Up International Contracts for the Construction of Industrial Works (1988).