The new IChemE professional services agreements

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John Challenger explores the new Silver Book

SINCE their introduction, the Institution of Chemical Engineers' (IChemE) published contracts have been acknowledged as being the most effective performance based contracts available for the process industries. The previous published contracts were drafted to cover the design, supply and construction of process and related plants primarily for the chemical industry, but have also been adapted for application in water, mining, rail and tunnelling projects.

Until 2016, the contracts dealt with projects for which a plant or facilities to meet a purchaser's requirements were ultimately to be constructed. IChemE's Contracts Committee had recognised for some time that there were a number of missing elements in its suite of contracts and it is now addressing this issue. Due to the lack of suitable contracts to cover essential elements of process plant development, many companies have found it necessary to adapt other published forms or use bespoke contracts for activities such as professional services and consultancy, particularly the initial technical and commercial development phases.

Clearly the scope of professional services required by the process and related industries can vary from relatively small and uncomplicated activities to large scale and complex projects. In order to cover this range, it was decided to create two forms of contract; the Short Form of Professional Services Agreement first published in electronic format in 2016, followed in 2017 by the long form developed for larger and more professional services. Although IChemE had included a short form of consultancy agreement in its publication *Consultancy - An Engineer's Guide to Getting Started*, that contract was aimed mainly at the requirements of individual consultants rather than the wider applications required by the process industry. It was therefore decided to abandon the previously published form and replace it with the short and long forms which have now been incorporated in a single publication, the Silver Book, which was launched in February 2017.

Previous users of the IChemE published contracts will find many aspects of the Silver Book familiar, however, it varies from the previous IChemE contracts in that it is for the provision of services only and does not include the procurement of materials or the construction of plant, and hence the obligations and liabilities of the parties are thus quite different. Nevertheless, the general sequence of clauses and schedules follow the previously published forms of contract. Guidance is provided on how to compile the agreement and schedules which form the core of the contract. The guide notes are also intended to aid interpretation of some of the general conditions; explain the need for certain special conditions; and to help in the overall approach to drafting the contract, of which some elements may be considered to be optional. Users of this form of contract are encouraged to read the relevant guide notes before preparing any contract.

Project definition – the essential phase

To put the Silver Book into context, it should be realised that one of the most crucial elements in any process plant development

is the definition phase, in which the project concept, feasibility and front-end design is undertaken. It is during this period that the essential business case, scope and technology are defined. Based on this essential data, the purchaser's requirements are established and it is these that ultimately form the basis of any specification and schedules upon which any subsequent detailed design and construction contract will be based. There is increasing concern that this important stage of project development is not carried out with the appropriate care or thoroughness needed to define the key factors that are essential to a future contract and as a result the subsequent execution of a project can be beset by technical, cost, programme and quality issues that can often lead to disputes.

It is essential when defining project requirements that appropriately qualified, trained and experienced project management and engineering staff be employed. The chemical industry has in many instances changed the manner in which it manages projects that has led purchasers to employ professional and consultancy services as a means of overcoming shortfalls in their internal engineering and project capacity. It is with these matters in mind that the new contract forms have been produced.

As with all other IChemE forms of contract, the guide notes emphasise that the purchaser should satisfy itself of the qualification and competence of any potential consultants or other service providers under consideration.

Contract structure

Since 2007, IChemE has published separate forms of contract for use either in the UK or for international application. It is a new departure for IChemE that the contracts in the Silver Book are structured so that they may be used in any location. As with the previously published international forms of contract, they will require the general conditions to be supplemented by the drafting of special conditions to deal with those matters arising out of specific governing law/jurisdiction and/or location of any intended project. The special conditions are in two parts; Part A (United Kingdom) in which specific statutory requirements such as the *Housing Grants, Construction and Regeneration Act* 1996 will apply and Part B (optional) in which example conditions that may be need to be drafted for reasons of location or purchaser preference.

The general conditions adopt a sensible and practical approach to the manner in which the purchaser and consultant should work together and hence they generally comply with English law. However, in view of the wide variations in law and contract practices outside of the UK, the guidance recommends that professional advice should always be sought regarding the appropriateness of any contractual terms or the need for additional content that may apply such as codes of practice. Whilst these forms have been prepared with the process industry in mind, they are sufficiently flexible to be suitable for other industries and types of work unconnected to the chemical industry in which concept/feasibility studies, project management services, business or product development, or cost estimating and management are required. The Silver Book has therefore been designed to act as a precursor to the existing IChemE forms of contract.

It should also be noted that whilst both forms of contract have been developed for consultancy and professional services the proportion of various types of scientific, technical, management and engineering activities may differ significantly from that normally found in typical process plant projects and as a result the two new forms vary from each other for the following reasons:

Professional services long form contract

This form of contract may also be used for more traditional engineering consultancy services including design, project management, procurement, quality control services and construction supervision, which are directly related to the planning and development of a project for the provision of a fully operational process plant. Generally, it is suitable for projects of high value or complexity in which the liabilities and responsibilities under the contract, although limited, may be quite broad in scope.

It should be noted that in drafting the general conditions, the provisions in respect of intellectual property have been developed beyond those previously published in the IChemE forms of contract for the provision of a process plant. It is considered that the long form could be used for services that require the consultant to have detailed knowledge of aspects of the purchaser's business that may be highly confidential. As a result, definitions, rights and liabilities have been introduced relating to the purchaser's intellectual property, the consultant's intellectual property and, very importantly, any intellectual property developed as a result of the services.

Unlike previous IChemE contracts in which the primary aim is the construction of a process plant, the deliverables will not normally be in the form of materials or plant but will be the 'documentation' (defined term) and the specific activities that comprise the 'services' as set out in schedule 2.

The consultant's liabilities are also considerably different to those of a contractor insofar that in this form there is no liability for any defects or faults in any resulting plant

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or activity undertaken by the purchaser that may be based on the services other than any defects or faults that are a direct result of the consultant's negligence.

Professional services short form contract

This form of contract is also suitable for consultancy type projects but with relatively limited scope professional services, generally shorter project timescales and, as a consequence, lower contract price. The short form is therefore structured so that the consultant's liabilities shall not exceed the contract price.

It is envisaged that the long and short forms may employ different types of organisation – both in nature and scale – but it is emphasised that the short form is not intended for the provision of personnel by way of secondment, agency or other similar arrangements. This form was published by IChemE online in 2016[1] and is printed in the Silver Book with its related guide notes.

Co-operation

The general conditions in particular have been formulated to reflect best practice and relationships within the process plant sector, which in any event is generally recognised as being far less adversarial than other parts of the construction industry.

IChemE's philosophy has always been that for complex technology process plants, the parties need to co-operate in order to achieve the mutual objective of a successful project. It recognises that it is in the best interests of the parties to deal fairly with each other and with their sub-consultants, specialists and advisors in an atmosphere of co-operation in order to achieve successful solutions to the problems that will inevitably arise during the course of any project – an approach which is particularly true in the case of professional services.

Payments terms

As the range and variety of professional services covered by this contract could differ widely, the payment mechanisms may also be equally wide. If, for example, the services can be defined with a predetermined timescale, the contract price is likely to be based on a fixed lump sum. Conversely, for pure consultancy services for which the outcome may initially be unknown, the project is likely to be undertaken on a reimbursable basis. The parties must carefully select and agree the pricing mechanisms to be adopted if disputes are to be avoided.

Most purchasers will not wish to commit themselves to unlimited expenditure, so it is imperative, even where it is not possible, to fully define the scope of work that some means of financial and time control should be applied to avoid misunderstandings emerging at a later stage of the services. Based on this approach to pricing and payment, the contract price is not to be stated in the contract agreement, but rather is defined as the total amount payable to the consultant. In reality, most services contracts will sit somewhere between the extremes of complete fixity and unconstrained scope, time and price – and therefore the pricing mechanisms adopted must be carefully chosen and agreed by both parties if disputes are to be avoided.

It is also advisable that even if it is not possible to fully define the scope of work initially, some means of financial and/or time control should be applied to avoid unrestrained expenditure taking place which could lead to misunderstandings at a later stage in a project. Under such circumstances, it is highly recommended that robust cost and programme controls be put in place to ensure that both parties are fully aware of the financial and time status of the project as it proceeds. The guide notes provide a useful table which contains some examples of the range of project types that can, with careful

[1] https://icheme.myshopify.com/collections/forms-of-contract-1/products/the-silver-book-professional-services-contract-short-form-agreement-1st-edition-2016-printable-pdf

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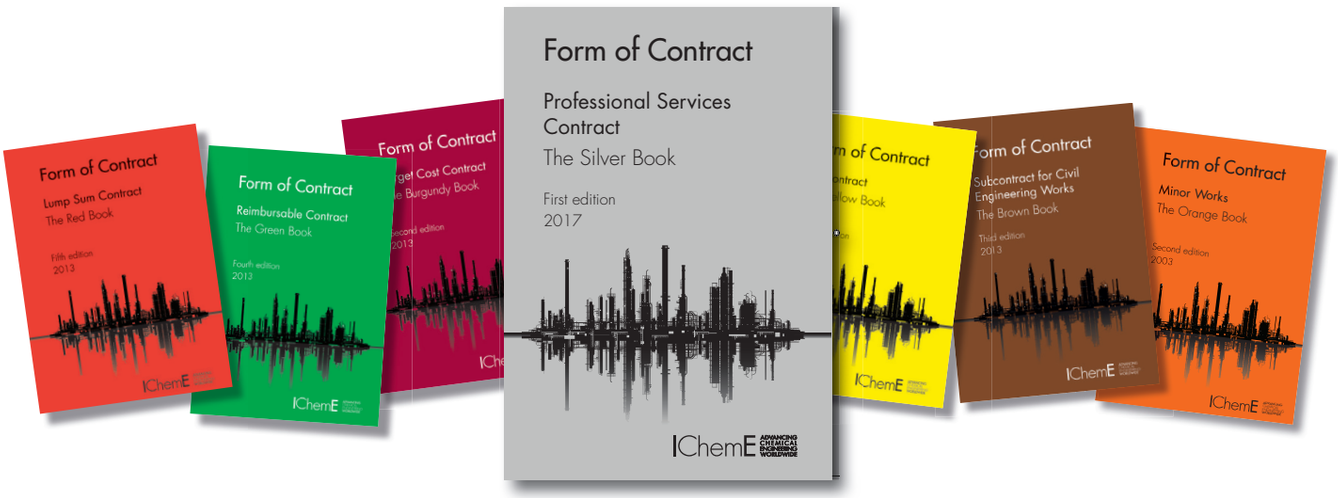

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The consultant's liabilities are also considerably different to those of a contractor and the short form reflects this.

drafting of the schedules and special conditions, be handled under this contract form.

Key dates and times

The long and short forms approach the question of project scheduling in a slightly different way, although both contracts require the parties to include any dates that can be defined or are of key importance to the successful completion of the services to be stated in the appropriate schedule. The short form does not refer to an 'approved programme' since it is envisaged that the consultant's role may not be capable of being fully defined, especially in cases where 'blue sky' thinking is required.

The Long Form is likely to be used for activities that have greater definition and would benefit from an appropriate level of scheduling. In any event, as part of normal contract execution, dates or timescales will generally relate to the issue of (a) 'deliverables' by the consultant to the purchaser or (b) 'documentation' from one party to the other.

Variations

The basic principles of the request and approval of variations remains similar to other published IChemE forms. The sub-clauses in the long form are detailed and reflect the more extensive scope and complexity of projects handled under this contract.

The short form simply states that no variation should be made without the parties' agreement and that all variations shall be instituted by the issue of a variation order. Both forms refer to the schedule on cost elements, rates and charges for the basis of any variation.

Suspension and termination

In the long form the purchaser can suspend the consultant's service with seven days prior written notice. The purchaser may instruct the consultant to restart the services and it should also issue a variation for any justifiable costs or programme extension caused by the suspension.

The short form follows a similar approach, but with shorter periods of notice and so on. It should be noted that if the suspension lasts for a period greater than 56 days in the long form and 30 days in the short form, then the consultant can give notice to terminate the contract. The long form contains provisions allowing the termination by the purchaser for convenience and also consultant's default. A reciprocal clause for purchaser's default is also included.

Disputes

The contract places a duty on the parties to endeavour to avoid disputes and to attempt to negotiate a settlement of any dispute of difference. This underlies a key part of IChemE's contract philosophy that a project is best served by teamwork and co-operation between the parties, not by confrontation.

In the event that a disagreement cannot be resolved by negotiation, steps are set out in the long form which must be followed by the parties. If a dispute under the contract is to be deemed to have arisen, arbitration is the primary route to dispute resolution, noting that the draft special conditions contain an example adjudication clause. Understandably, the dispute provisions in the short form are far simpler and the primary means of resolution is litigation, but again the parties can adopt an alternative approach.

Avoid changes to the conditions

Given the relatively low cost and limited liabilities associated with the application of the short form in particular, it is anticipated that the contract can be used without changes to the general conditions. As with all other contracts published by IChemE, the institution advises against modifications to the general conditions in order to avoid introducing provisions that may conflict with these well-established practices and relationships.

Users should particularly be aware of the risk of introducing inconsistencies within the contract conditions, or provisions that may be unenforceable. The consultant's liabilities are also considerably different to those of a contractor and the short form reflects this by deliberately limiting the financial obligations of the consultant in the event that it fails to satisfactorily carry out the services.

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John Challenger is currently chair of the IChemE contracts committee, of which he has been a member for over 30 years, contributing to the development of all of its published contracts. He is also a member of the IChemE Dispute Resolution Committee. In addition he provides independent project management and engineering consultancy and training services. He has over 40 years' experience in the process industries including; biochemical, pharmaceuticals, food, fine chemicals, oil and gas, petrochemicals, polymers, minerals, nuclear and defence industries. As a project director, project manager and lead design engineer, he has been responsible for the successful delivery of a large number of projects. Several international assignments have been undertaken in USA, Europe, Central Europe, Asia, North Africa, Arabia and the Far East. In addition to the above he has acted as project director and senior consultant on a number of projects in the renewables, nuclear, chemical and pharmaceutical industries. For several years he acted an arbitrator or expert appointed by the IChemE in a number of disputes and is currently a member of the IChemE disputes resolution committee. He also sat as a representative of the IChemE on the contract drafting committee for the IEE/IMechE forms of contract. He has published a number of articles on industrial and contract matters and was a member of the IChemE working party responsible for the drafting of the IChemE's *Guide to Containment Systems*.