

UPDATES FROM AROUND THE WORLD



SCOTLAND

Infrastructure conditions of contract

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The Association for Consultancy and Engineering (ACE) and the Civil Engineering Contractors Association (CECA) have launched the Infrastructure Conditions of Contract (ICC). This is a suite of standard form contracts, which is drafted under English law and replaces the ICE Conditions. The following contracts are available in the suite:

- Term version (plus guidance notes);
- Measurement version (plus guidance notes);
- Minor Works version;
- Partnering addendum;
- Design & Construct version (plus guidance note);
- Target Cost version (plus guidance notes);
- Ground investigation version (plus guidance notes).

The ICC suite contains all previous relevant amendments to the ICE Conditions but, unlike the ICE suite, is also compliant with the payment provisions of the UK's Local Democracy, Economic Development and Contracts Act 2009, which amends the Housing Grants, Construction and Regeneration Act 1996. These amendments came into effect for contracts entered into from 1 October 2011 in England and from 1 November 2011 in Scotland.

Although there are no ICC standard form subcontracts in

place yet, there will be very shortly. The CECA forms of subcontract, which are currently produced for use with the ICE 6th and ICE 7th, are being amended to make them compliant with the new Construction Act. These will then be used with the 'Measurement and Design and Construct ICC contracts'.

The Infrastructure Conditions of Contract Development Forum (ICoCDF) has also produced a book (*Tendering for Civil Engineering Contracts*) giving its views on what constitutes good practice in the conduct of civil engineering and infrastructure construction projects. The book is designed specifically to assist users of the ICC with the procedure between the start of the tender process and the award of the contract.

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FRANCE

Regulatory news: implementation of 'Grenelle 2'

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The 'Grenelle Environment' is a consultation process involving the French Government, local authorities, employer organisations, trade unions and NGOs and aiming to define a global

framework for the protection of the environment.

The consultations started in 2007 and a first law, named 'Grenelle 1', was passed on 3 August 2009, setting out the Grenelle programme. A second law, named 'Grenelle 2', was passed on 12 July 2010 to implement the programme. Grenelle 2 has a very broad ambit, covering issues such as construction and planning, transport, energy consumption and carbon emissions, biodiversity, waste and health, and governance.

A total of 199 decrees are required to implement Grenelle 2. A number of these decrees were passed in 2011. They cover issues such as energy efficiency diagnostics for buildings (decree 2011-807 of 5 July 2011), waste reduction and management (decree 2011-828 of 11 July 2011), thermal and acoustics regulations for new buildings (decrees 2011-544 of 18 May 2011 and 2011-604 of 30 May 2011), renewable energy in construction projects (decree 2011-830 of 12 July 2011) and the labelling of certain construction materials (decree 2011-321 of 23 March 2011).

The ongoing Grenelle process is resulting in major changes to many areas of the law, with a significant impact on the regulatory framework for construction projects in France.

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SLOVAKIA

Infrastructure projects update: issues relating to ownership of land

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On 28 October 2011, the first-ever Slovak PPP infrastructure project was opened; the first three sections of a new, 46 km expressway in Central Slovakia. The public authority (ie the Ministry of Transport) and concessionaire concluded the Concession Agreement on 23 March 2009 as the final step in the public procurement concession tender announced through the *Official Journal of the European Union* on 19 December 2007. Under the Concession Agreement, the concessionaire was awarded the exclusive right and obligation to draft design documentation, construct the works, finance the works and maintain and operate the project road for the concession period of 30 years. The project road is not a 'toll road'; however, the concessionaire is entitled to monthly payments throughout the concession period from the public authority (via the state budget). The final amount is influenced by factors such as full availability of lanes for usage, number of accidents and their consequences and volume of traffic.

The works on this project illustrated again that one of the crucial issues for construction projects in Slovakia is the due and proper acquisition of ownership rights (or other rights prescribed by the Slovak Construction Proceedings Act) to the affected plots of land by the investor (in the

case of highways or expressways this would be the state). Other rights are also considered, for example lease agreements, future purchase contracts, rights resulting from an encumbrance or special legal regulation (eg in the energy sector) entitling the contractor to carry out construction on land owned by another. It should be noted that the principle *superficies solo cedit* (ie that the owner of land is automatically the owner of any construction erected thereon) is not applicable in Slovakia.

As a general rule, in the case of construction (whether of buildings or infrastructure), documents proving such ownership title or other rights must be submitted to the respective construction authority at the time of applying for the construction permit. However, land ownership in Slovakia is scattered among a large number of owners and co-owners and frequently the owner is unknown. Therefore, it is always an administratively demanding and time-consuming task to establish a settled construction site in terms of ownership relations.

In order to facilitate the construction of highways and expressways in Slovakia, in December 2007, the Parliament of the Slovak Republic passed an Act on Extraordinary Measures for Preparation of Certain Construction of Highways and Roads for Motor Vehicles, as amended (Act No 669/2007 Coll, the 'Highways Construction Act'). According to the initial wording of the Highways Construction Act, should the contractor not be able to submit to the construction authority evidence proving his ownership or other rights to the affected plots of land, it may instead submit to the construction authority for the purposes of construction proceedings some evidence of intention to obtain the ownership title or other right to the land or, indeed, to the impossibility of obtaining title or other rights (eg evidence on pending inheritance proceedings). Evidence on ownership or other rights to the

affected plots of land would have to be submitted only at the proceedings leading to the issue of a use permit.

The concept that construction activities could be permitted on the land of a third person without legal title has been considered by many as unconstitutional. On 10 January 2008, a group of members of the Slovak Parliament initiated some related proceedings before the Constitutional Court. On 26 January 2011, the Constitutional Court held that these provisions in relation to construction activities on the land of another are in breach of the Slovak Constitution. The decision of the Constitutional Court was published in the Collection of Laws on 26 July 2011 and the relevant provisions of the Highways Construction Act immediately became ineffective. In short, the Constitutional Court identified, among others, a breach of the second sentence of section 20, paragraph (1) of the Slovak Constitution. The situation where a contractor may carry out the construction of a road infrastructure and even launch it into preliminary operation without the consent of the owner of affected land establishes an unconstitutional limitation of ownership title and represents de facto a method of illegal expropriation.

Nevertheless, other measures introduced under the Highways Construction Act facilitating the construction process remain effective. These are, for example, shortening the periods for the construction authority to issue a construction or use permit, shortening the periods for the participants to construction proceedings to file an appeal, delivering the decisions of the construction authority by public announcement rather than through registered post and simplifying the project documentation. All of these are to be welcomed.

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