

# A STANDARD SET OF TERMS OF CONTRACT FOR THE SUBMARINE TELECOMMUNICATIONS INDUSTRY

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**Abstract:** Unlike certain other industries, the submarine telecommunications industry lacks a recognized set of standard contractual terms. This paper looks at the approach taken in the submarine industry and that taken in other similarly structured industries and compares the advantages/disadvantages of the respective approaches. The paper argues that the industry could benefit enormously from the acceptance of a recognized standard set of terms for the small number of recurring types of contract, including those for turnkey system supply, system upgrades, marine maintenance and dry maintenance. Many purchasers have their own preferred model contract, which they include in a request for quotations (RFQ) and against which prospective suppliers are expected to bid, including a “statement of compliance,” indicating acceptance or non-acceptance of each term and any requested changes. The issuer of the RFQ then evaluates the offers received, including the statements of compliance as to the contractual terms. While direct comparisons between the merits of the technical solution proposed, or the pricing of equipment or services deemed equivalent, in the bids received may seem relatively straightforward, the risk associated with acceptance or non-acceptance of a particular contractual provision in either the original or some modified form may not be obvious to suppliers or purchasers, who may have difficulty quantifying the risk. So-called “non-compliances” invariably give rise to protracted discussions in bid-clarification meetings or best-and-final-offer negotiating rounds. The paper considers the significant benefits, including time to market for the customer, that would accrue to all involved parties if the industry were to adopt a recognized set of fair and balanced standard contractual terms for recurring types of contracts, and looks at some of the models for such an approach.

## 1 INTRODUCTION

Since most commercial contracts in the submarine telecommunications industry are of a few recurring types, it may seem odd that the industry lacks a recognized set of standard contractual terms. The fundamental business objectives and commercial expectations of suppliers, service providers and their customers, as expressed in calls for tender and negotiations for such common types of contracts as those for turnkey system supply, system upgrades, marine maintenance services and terrestrial operation and maintenance services, are broadly the same throughout the industry, and negotiated contracts vary little in terms of the subject matter covered. Yet the model contracts included as part of a request for quotation (RFQ) or used as the basis for direct negotiation without recourse to competitive bidding for specific transactions vary widely. If the submarine telecommunications industry were to adopt an accepted set of standard contractual terms for recurring types of contracts, contracting parties would reap very considerable benefits, including in terms of legal certainty, ease of negotiations and time to market.

## 2 BACKGROUND

### 2.1 Competitive Bidding

In the case of contracts that are put out to competitive bidding, the RFQ very often includes a form of contract, which may be the issuer’s own preferred model or simply a form taken from a previous transaction. The RFQ states that each bid must include

a detailed “statement of compliance” in the form of a table listing every numbered clause of the form of contract and stating, for each term, whether the bid “complies” (i.e., the bidder is prepared to sign a contract containing that term) or “does not comply” (i.e., the bidder is unwilling to sign a contract containing that term). The instructions in the RFQ for completion of the statement of compliance routinely specify that any response other than “complies” or “does not comply” is unacceptable and will be a ground for rejection of the bid. The form of statement of compliance typically includes a column for comments in which the bidder can explain any so-called “non-compliant” response, either giving the reasons why it cannot accept the clause as written, or at all, or offering a revised version of the clause that it would consider acceptable. As part of the bid evaluation process the prospective purchaser then counts up the number of “non-compliant” response and considers any related comments.

Most bidders are disinclined to challenge the conventional wisdom according to which, all other things being equal (which they never are, of course), a bid with fewer “non-compliant” responses and related comments or proposals for new wording is more attractive and, therefore, more likely to be accepted than one with more, regardless of whether the form of contract as modified by the bidder’s statement of compliance would be fair and reasonable in any objective sense.

In spite of the rules of the RFQ, or maybe because of them, bidders have a strong incentive to minimize the number of “non-compliant” responses in the statement of compliance, and to this end bidders often express objection to a particular term with a response that, while itself “non-compliant” with the rules of the RFQ, is intended to sound more acceptable than “does not comply.” Thus bidders may give responses such as “partly complies” or “complies, except for ...” or include remarks in the comment column for terms with which the bid “complies.” Bidders sometimes also propose new clauses to be added to the form of contract. Another concern bidders struggle with is how to deal with an objection to a term that comes up in several places in the form of contract while keeping the number of “non-compliant” responses to a minimum.

By reason of the tabular form of the statement of compliance, the explanations given for any “non-compliant” responses are necessarily short, frequently in the form of sentence fragments, and the reasoning behind any proposed new wording for a particular clause is usually not stated and may not be obvious, and the competitive-bidding process itself, at least up to the initial-evaluation stage, affords little or no practical opportunity for an exchange of views that could lead to agreement on a mutually acceptable contractual term. The task for the prospective purchaser of reviewing a contractual statement of compliance and comparing it with those submitted by other bidders is, therefore, a difficult one, even when bidders give no response other than “complies” or “does not comply,” and all the more so when they resort to any of the above-mentioned other approaches.

The contractual statement of compliance invariably gives rise to protracted discussions in bid-clarification meetings or so-called “best-and-final-offer” negotiating rounds, but it is in the nature of the process that these discussions rarely become true negotiations, such as would occur between parties that had already decided to contract with each other, because these sessions are in essence an extension of the bid review stage, the purpose of which is to choose the winning bid. Since choice often occurs quite late in the process, there is little practical opportunity for true negotiations.

Instead, in an effort to simplify the process of evaluation and comparison of contractual statements of compliance in competing bids, the prospective purchaser’s goal in these sessions is usually that bidders simply withdraw so-called “non-compliances,” which bidders may feel compelled to do even though it may mean accepting a risk previously thought, at the bidding stage, to be unacceptable.

## **2.2 Direct Negotiations**

In the case of contracts that are directly negotiated without recourse to competitive bidding, the form of contract used as the starting point for discussions is

usually the drafter’s preferred model or a form taken by the drafter from a previous transaction. As a result the first draft varies considerably from one transaction to another and may be unfamiliar to the other party. Of course, these considerations generally would not apply when parties to a contract decide to use the same form for a new contract between them for the same type of transaction.

The process in the case of direct negotiations is very different from that in competitive bidding because the parties have already decided to contract with each other subject to their reaching agreement on the specific terms. Negotiations afford the parties an opportunity to exchange views, often with the assistance of counsel, on the interpretation and drafting of individual contractual terms and to agree on mutually acceptable wording. However, even direct negotiations can be time-consuming, costly and difficult. While, in principle, both parties may want to end up with what they would consider a fair and balanced contract, but, if the form of contract used as the starting point for discussions is unfamiliar to one of the parties or, worse, is perceived as one-sided, the process of achieving that goal can be arduous.

## **3 CONTRACT AS LEGAL FRAMEWORK FOR COMMERCIAL RELATIONSHIP**

The fundamental business objectives and commercial expectations of suppliers, service providers and their customers in common types of contracts are broadly the same throughout the submarine telecommunications industry. Customers are primarily concerned with getting equipment and services that meet agreed specifications and are delivered within agreed timescales, and equipment suppliers and service providers are primarily concerned with receiving timely payment of the agreed purchase price. The contract is merely the legal framework for the commercial relationship. It should translate the parties’ expectations into rights and obligations and allocate risks and responsibilities.

Certain recurring types of contracts, such as those for turnkey system supply, system upgrades, marine maintenance services and terrestrial operation and maintenance services, tend to vary little in terms of the subject matter covered, and that similarity provides an opportunity for standardization.

### **3.2 Disadvantages of the Current Situation**

In the context of competitive bidding, the principal basis of comparison should be the price and technical features of the solution or services being offered. While direct comparison of the technical merits of competing bids, or the pricing of equipment or services deemed equivalent, would ordinarily seem straightforward, analysis and comparison of contractual statements of

compliance may not be obvious, and the risk associated with a particular contractual provision in one form or another may be difficult to quantify. Bidders will necessarily attempt to assess the risks associated with particular contractual provisions and account for those risks in their pricing. Lengthy adjudication processes or negotiations consume resources and increase the customer's time to market. These same considerations generally apply to direct negotiations as well.

### 3.3 Advantages of an Industry Standard

Use of a recognized standard set of terms for the small number of recurring types of contract in the submarine industry would afford significant advantages. In the context of competitive bidding, it would create a level playing field, with the result that the principal basis of comparison between competing bids would be the price and technical features of the solution or services being offered. Simultaneous assessment of risks associated with particular contractual provisions would be unnecessary, as would price differentials designed to take account of such risks, since contracts would be based on an accepted form viewed as fair and balanced. Contractual negotiations would be faster and easier, resulting in improved time to market for customers.

## 4 MODELS FOR COMPARISON

The construction industry provides the most obvious and relevant example of the successful use of standardized contracts. The Institution of Civil Engineers (ICE) offers a family of standard contracts for civil engineering works drafted by ICE's Conditions of Contract Standing Joint Committee. In use for more than 50 years, the ICE conditions of contract are jointly sponsored by ICE, the Civil Engineering Contractors Association (CECA) and the Association of Consulting Engineers (ACE) and have been designed to standardize the duties of contractors, employers and engineers and to distribute the risks inherent in civil engineering to those best able to manage them.<sup>i</sup> The Joint Contracts Tribunal Ltd also offers numerous families of construction-related model contracts.<sup>ii</sup> The International Federation of Consulting Engineers (FIDIC) is another resource for model construction-industry contracts. FIDIC offers several different forms of contract, including in languages other than English, and related guides.<sup>iii</sup> The American Institute of Architects also offers standard forms of contract.<sup>iv</sup>

The Baltic and International Maritime Council (BIMCO) provides another example of successful contract standardization with obvious relevance to the submarine telecommunications industry. BIMCO, through its Documentary Committee, develops widely-used maritime contracts and other related forms, such as charter parties, other shipping documents and clauses intended to strike a fair and equitable balance between the parties in legally sound language readily understood

by both. One of the goals of BIMCO's shipping documentation is to prevent contractual disputes.<sup>v</sup>

## 5 CONCLUSION

The submarine telecommunications industry could likewise benefit enormously from the acceptance of a recognized standard set of fair and balanced contractual terms for the small number of recurring types of contract, including those for turnkey system supply, system upgrades, marine maintenance and dry maintenance. Among these benefits are improved time to market for the customer, a level playing field for competitive bidding, easier comparison of pricing and technical merits of competing bids, and legal certainty. SubOptic itself might serve as the forum, or one of the possible forums, for the development of such a standard for the submarine telecommunications industry.

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<sup>i</sup> See [http://www.ice.org.uk/knowledge/contracts\\_conditions\\_of\\_contract.asp](http://www.ice.org.uk/knowledge/contracts_conditions_of_contract.asp).

<sup>ii</sup> See <http://www.jctltd.co.uk/stylesheet.asp?file=29072005094705>.

<sup>iii</sup> See [http://www1.fidic.org/bookshop/default\\_contracts.asp](http://www1.fidic.org/bookshop/default_contracts.asp).

<sup>iv</sup> See [http://www.aia.org/docs\\_default](http://www.aia.org/docs_default).

<sup>v</sup> See <http://www.bimco.org/Corporate%20Area/Documents/Document%20samples.aspx>.