

FIDIC forms of contract – The experience of ITER

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Joint meeting of the INLA WG1, WG3 and WG5

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AGENDA

- 1. FIDIC v nuclear and the relevance of ITER**
- 2. Public body status and public funding**
- 3. Public procurement**
 - A. Variation**
 - B. Claim**
 - C. Dispute adjudication board**

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Attributes of FIDIC

- **Standard forms**

- Customization through particular conditions
- Limits for modifications?

- **Well known in international infrastructure projects**

- International best practice
- Balanced risk allocation
- 'Fair' Engineer (contract administrator)
- Tested: established court practice

- **Investors/ funders are familiar with**

- Special form exists for Multilateral Development Bank funded projects
- Development Banks and (other) Climate Finance Institutions promote FIDIC forms
- EU funding programs and the European Investment Bank require FIDIC forms
- Popular in the Middle East

FIDIC for nuclear?

- **Major role for international nuclear supply chain**
 - Legal certainty abroad
 - Standardization in multi-package and split-package projects
 - Examples already exist in the UK nuclear new build
- **Nuclear is a candidate for national climate mitigation efforts and requires finance**
 - FIDIC Sustainable Development Committee: should nuclear be represented?
 - Sustainable infrastructure: a new asset class?
 - Securitization (e.g. via green bonds) will require standardization
- **Model standard forms of contract, specific to NPP construction?**
 - FIDIC generally supports clean energy technologies **but** nuclear

The relevance of ITER

- **ITER = International Thermonuclear Experimental Reactor**
 - World biggest clean energy R&D project
 - Fusion = nuclear
 - ITER INB174: basic nuclear installation licensed in France
- **Deliberate choice of the Euratom Domestic Agency, followed by the ITER Organization to use FIDIC forms**
 - To attract European (and now international) construction industry
 - To increase competition
 - To allow for combination of multi-package and split package procurement methods in the supply chain
 - To emphasize the international character of the project
- **FIDIC welcomes and appreciates the ITER experience**
 - ITER experience was presented as a successful FIDIC case study on the 2014 and 2015 FIDIC International Contract Users' Conference in London
 - FIDIC Contracts Committee has shown interest in assessing the ITER experience in detail
 - Possible model for future fusion installation construction?

The ITER experience

- **ITER experience is a showcase**

- Compliance with inflexible mandatory requirements

- International organization/ EU body:

- Income-determined budget
- Public body acting as the Employer
- Enhanced Employer's involvement in the Contract administration in order to reinforce cost control

- EU and equivalent public procurement rules:

- Nuclear projects like ITER are prone to modifications
- Flexibility provisions contemplating foreseeable changes in the initial Contract
- Modification during Contract implementation is a key issue for contracting authorities relying on public funds
- Unilateral appointment of a permanent dispute adjudication board

- (French) nuclear safety regulations:

- Robust quality assurance and control procedures allowing for a strong supply change management and oversight

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International organization/ EU body v FIDIC

- **Income-determined budget:**

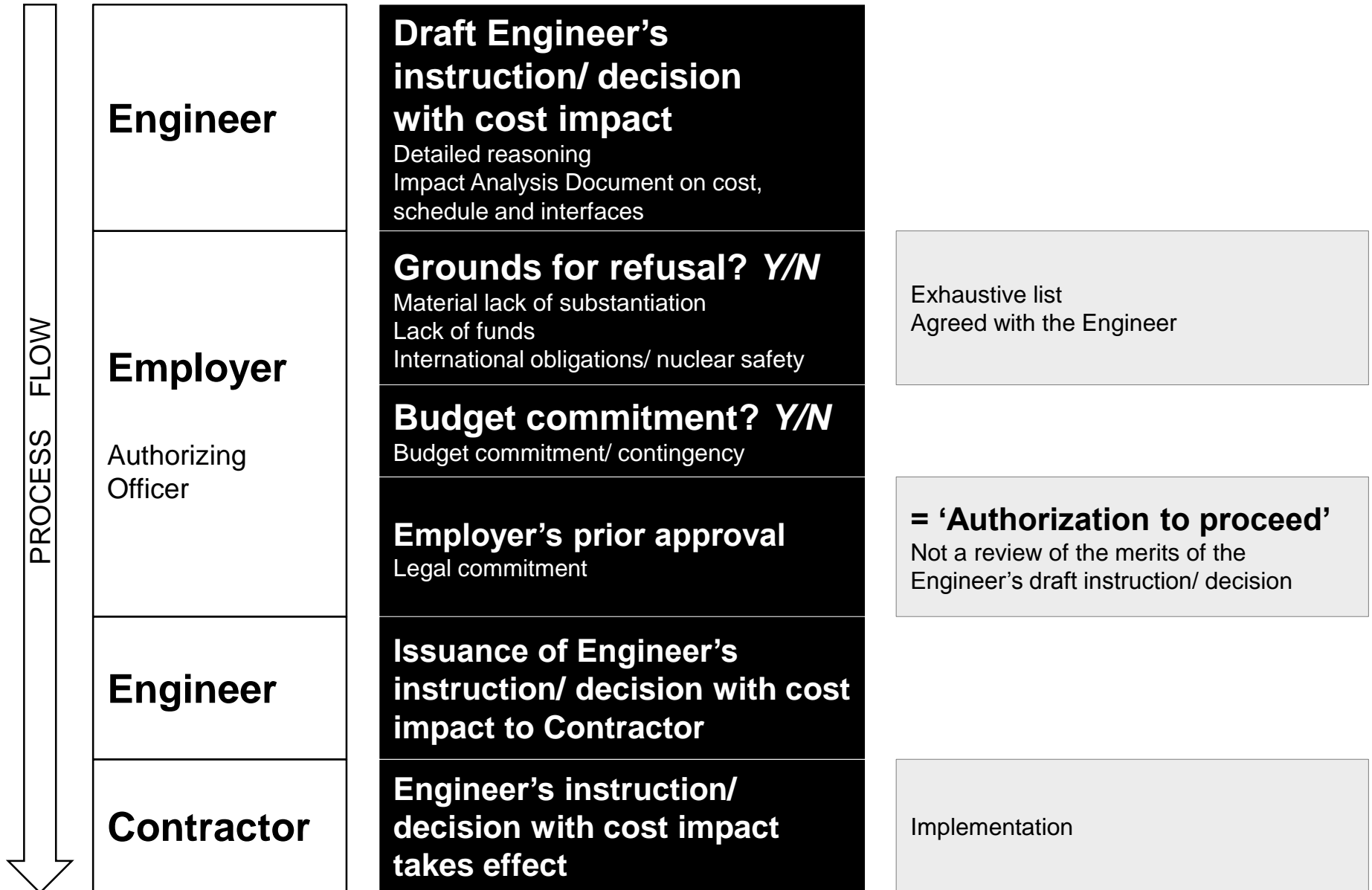
- Expenditure must equal to income: before spending is made, it must be verified that income will cover it
- Effective independence of international organizations

1. **Budget commitment** must precede a legal commitment
2. **Implementation** may not be commenced before the legal commitment enters into force
3. **Only** the Authorizing Officer of the relevant EU body may financially commit that EU body
4. **Financial delegation** by the Authorizing Officer may only be given to the employees of that EU body

- **Effects on the Engineer's powers:**

- Any Engineer's instruction/ decision with an impact on the Contract Price/ Time for Completion/ interfaces must be subject to Employer's prior approval

'Authorization to proceed' procedure



EU v FIDIC approach to contract modification

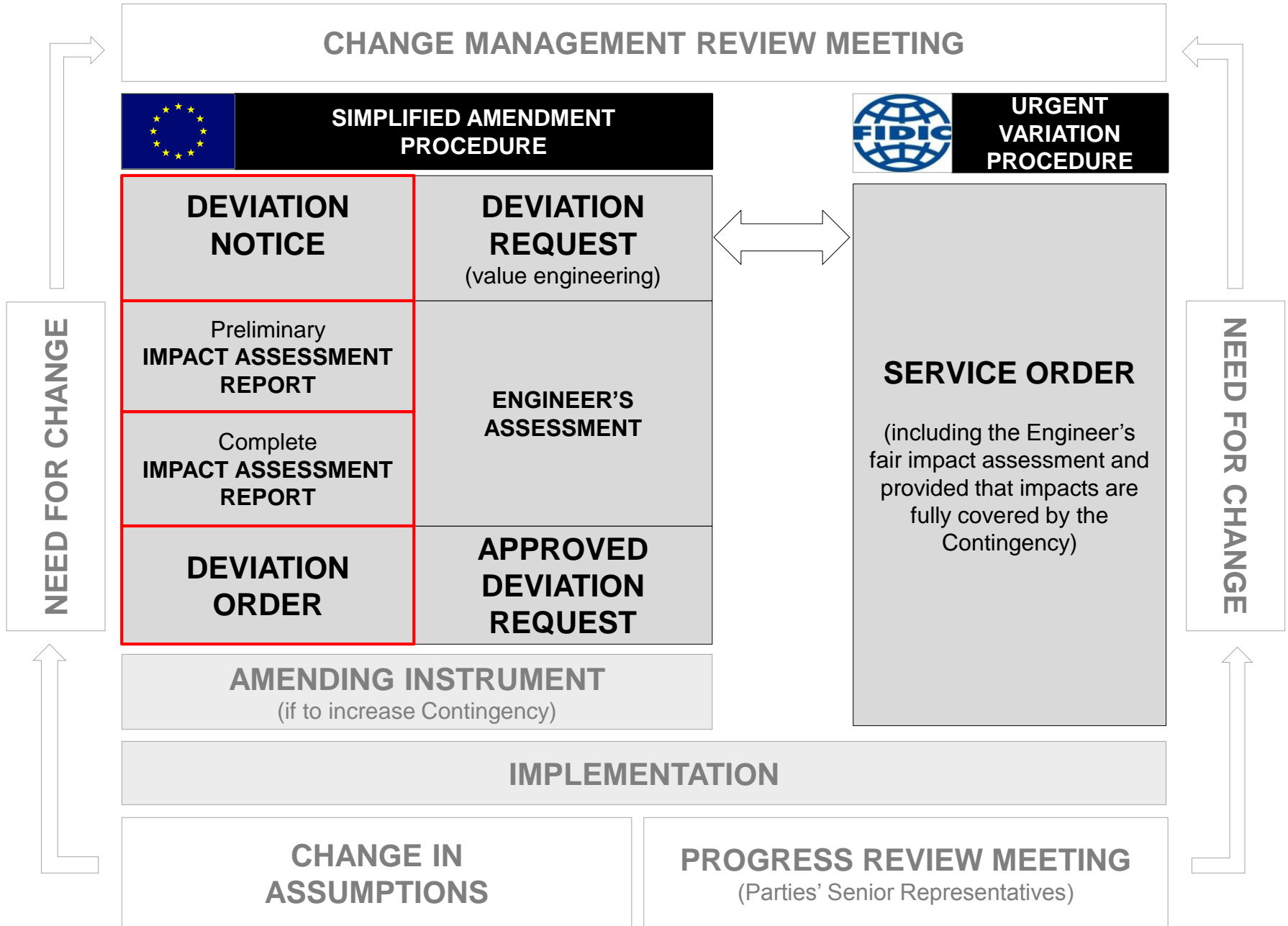


<u>CRITERIA</u>	'ADDING NEW LAYERS TO THE CORE OF THE PROJECT'	'PROJECT ON A GOING-CONCERN BASIS UNDER THE PROJECT UMBRELLA'
MANAGEMENT	By the Employer with support of the Engineer	By the Engineer with no or limited involvement of the Employer
AGREEMENT ON IMPACTS	All impacts must be agreed	No need to reach agreement, 'requirements for recording of Cost'
FINANCING	Legal commitment must respect budget commitment and vice-versa	Under the Employer's 'financial umbrella', Variations may be instructed and executed
IMPLEMENTATION	Implementation may start only after all impacts are agreed	Implementation may start upon instructing a Variation with no need to reach agreement on impacts
PAYMENT	No payment can be made until all impacts agreed	Payment can be made as works progress

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Variation: the Euratom Domestic Agency



Variation v negotiated procedure

DEVIATION NOTICE	Engineer's Impact Analysis Document
Preliminary IMPACT ASSESSMENT REPORT	Engineer's preliminary assessment and Employer's evaluation
Discussions	Change management review meeting
Complete IMPACT ASSESSMENT REPORT	Engineer's final assessment and Employer's evaluation
Impact Analysis Document	
DEVIATION ORDER	Authorizing Officer's decision
AMENDING INSTRUMENT (if to increase the Contingency)	Budget and legal commitments unless fully covered by the Contingency
Implementation	Modification takes effect

Variation v negotiated procedure

Justification for negotiated procedure with incumbent Contractor	CALL FOR TENDER AND TENDER SPECIFICATIONS
Opening and Evaluation Committees	PRELIMINARY TENDER
Negotiation mandate and objectives	Negotiations
Final evaluation supported by external experts as appropriate	FINAL TENDER
Recommendation of Evaluation Committee for award	Evaluation Report
Authorizing Officer's decision	AWARD DECISION
Award notice	Ex post publicity
At least 10 days	Standstill period
Budget and legal commitments	AMENDMENT
Modification takes effect	Implementation

Variation v negotiated procedure

Justification for negotiated procedure with incumbent Contractor	DEVIATION NOTICE	Engineer's Impact Analysis Document
Opening and Evaluation Committees	Preliminary IMPACT ASSESSMENT REPORT	Engineer's preliminary assessment and Employer's evaluation
Negotiation mandate and objectives	Negotiations	Change management review meeting
Final evaluation supported by external experts as appropriate	Complete IMPACT ASSESSMENT REPORT	Engineer's final assessment and Employer's evaluation
Recommendation of Evaluation Committee for award	Evaluation Report	
Authorizing Officer's decision	DEVIATION ORDER	Authorizing Officer's decision
Award notice	Ex post publicity	
At least 10 days	Standstill period	Budget and legal commitments unless fully covered by the Contingency
Budget and legal commitments	AMENDING INSTRUMENT (if to increase the Contingency)	
Modification takes effect	Implementation	Modification takes effect

Why to 'negotiate' under the Contract?

- **Negotiated procedure under the Contract** takes place if the Contingency does not fully cover the cost impact of the modification

- Variation serves effectively the same purpose as a negotiated procedure
- No guarantee that in the case of a negotiated procedure with the incumbent Contractor outside the Contract, the Contractor would offer lower unit rates than in the initial Contract
- Schedule of Rates for Variations were obtained in the initial (real) competition
- Clear, precise and explicit mechanism in the initial Contract for pricing Variations (including establishment of new unit rates)
- Contractor must follow this and use the unit rates of the initial Contract
- It cannot therefore modify overall nature of the initial Contract

- **Employer has full discretion** as to agreeing on the impacts of a modification and instructing it as a Variation

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FIDIC contract modification mechanisms

<u>VARIATION</u>	<u>CLAIM</u>
Future activities	Past or current event/ circumstance
Still to be performed	Being performed or already performed
Subject to Employer's prior approval	Employer has no discretion
Changes/ additions to scope of the initial Contract	No change to scope of the initial Contract (But may require a Variation to overcome consequences)
Presumes prior agreement on cost and schedule	Presumes no prior agreement on cost and schedule (Likely to be determined by the Engineer)
Fully covered by the Employer's Contingency/ provisional sum	Employer's Contingency/ provisional sum cannot be used
Based on Contractor's financial offer and agreed schedule impact (Using unit rates of the initial contract ≠ Cost plus 'fee')	Incurred Cost/ plus reasonable profit/ and extension of Time for Completion determined (No use of unit rates = Cost or Cost plus 'fee')
Public procurement constraints apply during Contract implementation	Falls under the public procurement exemption

Claim: public procurement exemption

- **‘Clear, precise, explicit review clause’**: pre-defined procedure for events/ circumstances where the Contractor becomes entitled to compensation in accordance with the initial Contract
 - Claims do not modify the initial Contract
 - Contractor executes the initial works (no additional works)
 - It is a result of risk allocation foreseen in the initial Contract
 - It cannot therefore modify the overall nature of the initial Contract
 - Additional Cost/ plus reasonable profit/ extension of Time for Completion must be incurred/ and evidenced (resembling a cost-plus-fee mechanism)
 - Eligibility and reasonableness of Cost and evidence are determined by the Engineer as certifier
- **Employer has no discretion** as to determining/ quantifying the Contractor’s entitlement

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ITER dispute adjudication board (DAB)

- **Due to public procurement constraints the contracting authority Employer was responsible for the establishment and the management of a single, permanent DAB**
 - **Two-party contracts** between the Employer and the adjudicators were entered into as the Contractors under the ITER buildings and services construction contracts/ interface agreement could not be a Party to a public contract/ expert contract resulting from a public procurement procedure/ expert selection procedure
 - **Selection procedure** was an open, widely advertised competition, compliant with the public procurement principles of transparency, proportionality and equal treatment/ non-discrimination
 - **DAB members** were imposed on the Contractors
 - **Recovery mechanism** was introduced for the Employer in the construction contracts if the Contractor failed to honour the award of costs

ITER dispute adjudication board (DAB)

- **Adjudicators are obliged to ensure:**
 - The Parties to have effective resort to adjudication
 - To be independent and fair
 - To act impartially
 - To have no conflict of interest
 - To maintain confidentiality
- **To measure compliance:**
 - **Objective quantitative criteria** were defined based on Union law and best practice
 - **Compliance verified** at DAB contract signature and at each referral to adjudication
 - **Continuing liability** for the adjudicators to disclose, inform, recommend recusing, bring to the attention of the Employer, the Contractors and the other adjudicators

Take away

- **Nuclear needs standard forms of contract**
- **FIDIC – due to its attributes – may be a candidate**
 - Especially if nuclear received public funding and the project was subject to public procurement
- **FIDIC may provide adequate tools to overcome public procurement constraints**
 - Through effectively differentiated Variation and claim procedures
 - Combined with an ‘authorization to proceed’ mechanism and the negotiated procedure without prior publication with the incumbent Contractor
- **The ITER experience may be the Trojan horse for nuclear to FIDIC**

**Thank you for your
attention**