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FIDIC

Overview of the FIDIC standard forms of contract



FIDIC is a federation of more than 70 national member associations of consulting engineers worldwide. It is best known for publishing standard forms of contract intended for international use. In 1999 FIDIC published a set of 4 new standard forms of contract, meanwhile well known as the NEW FIDIC BOOKS, First Edition 1999. This article gives a general overview of these new forms, addresses FIDIC's new philosophy in respect of the role of the Engineer and highlights the importance of timely "claim notices" by the Contractor.

THE FIDIC ORGANIZATION

"FIDIC" means Fédération Internationale des Ingénieurs-Conseils, the International Federation of Consulting Engineers. Its secretariat is based in Geneva, Switzerland.

It was founded in 1913 by three national associations of consulting engineers within Europe (Belgium, France & Switzerland) in order to promote in common the professional interests of the member associations and to disseminate information of interest to members of its component national associations.

Meanwhile the FIDIC organization represents most of the private practise consulting engineers in the world. It regularly arranges seminars and conferences exchanging views and information on the latest developments in the construction field and discussing problems of mutual concern among member associations and representatives of the international financial institutions.

One of FIDIC's key objectives is to promote sound and effective project management of engineering works. In pursuit of this objective, FIDIC has for many years prepared and published standard forms of contract documents related to the procurement of engineering works.

THE FIDIC CONTRACTS

HISTORICAL BACKGROUND

The origins of the FIDIC standard forms of contract actually lie in the Institution of the Civil Engineers London (ICE) form of contract, which was issued in 1956 by UK-Engineers. In 1957 FIDIC adopted this version and published its first edition of a standard form of contract called the "Red Book" for civil engineering works in the international field.

Since then FIDIC has regularly updated its standard forms of contract which are commonly known by the colours of their respective covers ("Red Book", "Yellow Book", "Silver Book", "Orange Book", "White Book", etc... - together also called the "FIDIC Books").

The FIDIC standard forms of contract have been "produced by engineers for the use of engineers" the implication being that engineers should be capable of resolving most problems in a project without reliance on lawyers.

The FIDIC standard forms of contract are recommended for general use where tenders are invited on an international basis.

FIDIC considers the official and authentic texts to be the versions in the English Language.

THE "NEW" FIDIC STANDARD FORMS OF CONTRACT

In September 1999 FIDIC updated its existing main standard form of contracts by publishing 4 revised versions designed to take into account the developments over the past decade in the international construction industry. The new forms are defined by FIDIC as follows:

The Conditions of Contract for Construction, FIRST EDITION 1999 (new "Red Book")

The Red Book is recommended for building or engineering works designed by the Employer or his representative, the Engineer. Under the usual arrangements for this type of contract, the Contractor constructs the works in accordance with a design provided by the Employer. However the works may include some elements of Contractor-designed civil, mechanical, electrical and/or construction works. Normally this type of contract is concluded on a measured basis.

The Conditions of Contract for Plant and Design-Build, FIRST EDITION 1999 (new "Yellow Book")

The Yellow Book is recommended for the provision of electrical and/or mechanical plant, and for the design and execution of building or engineering works. Under the usual arrangements for this type of contract, the Contractor designs and pro-

vides, in accordance with the Employer's requirements, plant and/or other works, which may include any combination of civil, mechanical, electrical and / or construction works. This type of contract is normally based on a lump-sum price where the Contractor takes the risk of changes in cost arising from his design.

The Conditions of Contract for EPC/ Turnkey Projects, FIRST EDITION 1999 ("Silver Book")

The Silver Book is recommended for the provision on a turnkey basis of a process or power plant, of a factory or similar facility, or of an infrastructure project or other type of development, where (i) higher degree of certainty of final price and time is required, and (ii) the Contractor takes total responsibility for the design and execution of the project, with little involvement of the Employer. Under the usual arrangements for turnkey projects, the Contractor carries out all the Engineering, Procurement and Construction (EPC), providing a fully-equipped facility, ready for operation (at the "turn of the key"). This type of contract is based on a lump-sum price.

The Short Form of Contract, FIRST EDITION 1999 ("Green Book")

The Green Book is recommended for building or engineering works of relatively small capital value. Depending on the type of work and the circumstances, this form may also be suitable for contracts of greater value, particularly for relatively simple or repetitive works or work of short duration. Under the usual arrangements for this type of contract, the Contractor constructs the works in accordance with a design provided by the Employer or by his representative (if any), but this form may also be suitable for a contract which includes, or wholly comprises, Contractor-designed civil, mechanical, electrical and/or construction works.

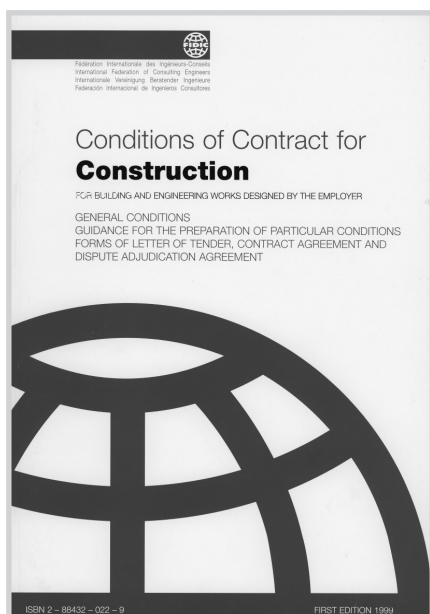
OTHER EXISTING FIDIC STANDARD FORMS OF CONTRACT

In the past, also other standard forms were published by FIDIC, which are partially still in use (non exhaustive list of latest versions):

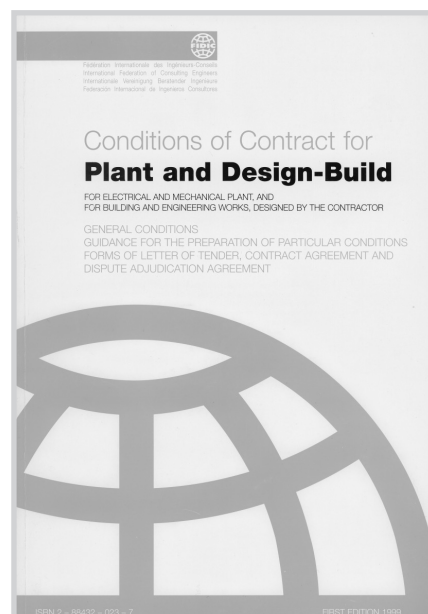
- > Client/Consultant - model services Agreement ("White Book"), Third Edition 1998
- > Joint Venture (Consortium) Agreement, First Edition 1992
- > Sub-Consultancy Agreement, First Edition 1992
- > Conditions of Sub-contract for Works, of Civil Engineering Construction, First Edition 1994
- > Previous Editions of the Red Book (First Edition 1957 to Fourth Edition 1987) & the Yellow
- > Book (First Edition 1963 to Third Edition 1987)
- > Conditions of Contract for Design-Build and Turnkey (Orange Book), First Edition 1995

THE STRUCTURE OF THE NEW RED, YELLOW & SILVER BOOK

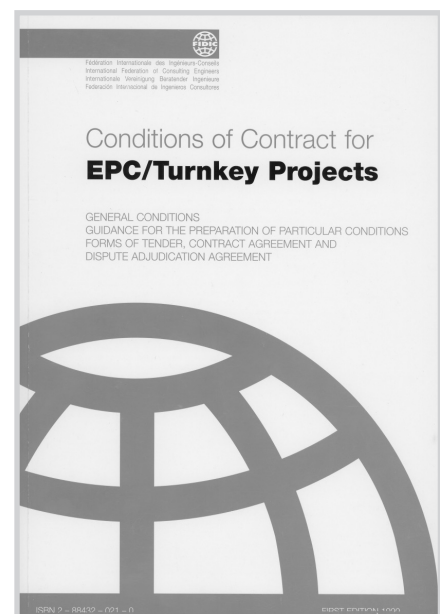
It is to be general noted that the FIDIC standard forms of contract originate from a common law system (England) where the function of a contract is to provide a detailed, comprehensive set



Picture 1: The new "Red Book" issued by FIDIC



Picture 2: The new "Yellow Book" issued by FIDIC



Picture 3: The new "Silver Book" issued by FIDIC



of precisely drafted rules which exactly regulate the regulations between the parties in a self contained document covering all probable commercial, technical as well as legal and administrative matters in very detail. It is strongly recommended that the applicableness of such rules in civil law systems such as continental Europe needs to be checked and confirmed by local legal advisers.

The standard forms of contract of the new FIDIC Books consist of the following three main parts:

Part I:

GENERAL CONDITIONS

Part II:

GUIDANCE FOR THE PREPARATION OF PARTICULAR CONDITIONS

Part III:

FORMS OF LETTER OF TENDER, CONTRACT AGREEMENT AND DISPUTE ADJUDICATION AGREEMENT

Both the General Conditions and the Particular Conditions together comprise the "Conditions of Contract" governing the rights and obligations of the parties. While the General Conditions can be used as drafted, it is necessary to specifically prepare the Particular Conditions for each individual contract.

COMPARISON OF PREVIOUS AND NEW FIDIC BOOKS

Although the new Red and new Yellow Books follow the same principles and philosophy as their predecessors, they are considerably different in actual structure, layout and wording. A main structural change is that the new 1999 Books are not split up any more according to the type of work to be performed (civil works, electrical and mechanical works), but according to the design responsibility (works designed by the Employer, works designed by the Contractor).

There is the following relation between the new and the old pre-1999 FIDIC standard forms of contract:

Previous forms of contract:	New 1999 forms of contract:
old Red Book, Fourth Edition, 1987	new Red Book, First Edition 1999
old Yellow Red Book, Third Edition, 1987 Orange Book, First Edition, 1995	new Yellow Book, First Edition 1999
-	Silver Book, First Edition 1999
-	Green Book, First Edition 1999

A serious shortcoming of the old Red and Yellow Books was that they had been prepared by different drafting groups, which resulted in the fact that the same subject matter that was common to both was drafted quite differently, for example contained the old Yellow Book a Force Majeure clause whereas the old Red Book was dealing with Special Risks.

The differences in standard forms of contract dealing with the same or similar subject matter in a different way for no apparent reason are now corrected in the latest version of the forms. This goal for harmonisation was facilitated by the assignment of the responsibility for the drafting of the new Red, Yellow and Silver Books to a single FIDIC task group.

The three major Books are based now on 20 main clauses, covering similar subject matters in all three Books except Clause 3 (The Engineer/ The Employer's Administration), Clause 5 (Nominated Subcontractors/ Design) and Clause 12 (Measurement Evaluation /Tests after Completion).

The Green Book has just 15 clauses covering 10 pages.

THE FIDIC FORMS OF CONTRACT & THEIR RISK DISTRIBUTION

The type of FIDIC form of contract to be used for a given project is usually within the control or choice of the employer. Hence it is the responsibility of the con-

tractor to make himself familiar with the chosen type of contract already at the tender stage of a project and to analyse in detail the risks involved resulting from such contract in order to be able to prepare his offer price.

He will therefore not only review the general contractual documents (drawings, bill of quantities, standards & specifications etc.) issued by the employer but especially the all important Conditions of Contract, which define the allocation of the risks to the contracting parties.

The philosophy of FIDIC in respect of the conditions of contract is to reflect fair balance in terms of risks between the employer and the contractor: "Give the risk to the party who is best able to cope with it."

The risks are most manageable for the contractor in a traditional construction contract (FIDIC "Red Book"), since the Employer provides most of the design.

The risks increase for a contractor with a contract for plant and design-Build (FIDIC "Yellow Book"), since the contractor does the majority of the design works in respect of the plant, infrastructure etc. in accordance with performance specifications prepared by the Employer.

The risks with the highest level for the contractor are contracts for EPC/ turn-key projects (FIDIC "Silver Book"), since not only all construction risks have to

standard forms

be evaluated but also financial and even political risks are of high importance. The contractor usually takes over in this type of projects total responsibility for the design. Furthermore, the Employer and also the Banks and investment institutions financing the project are deeply interested in the content and wording of these EPC contracts, not for construction reasons but primarily to ensure that as much risk as possible is passed down to the contractor resulting in the demand for a fixed lump-sum price contract. As a result thereof the construction contracts are finally very often written in a manner unique to each project. Therefore the standard form of contract of the FIDIC Silver Book, which anyway departs from the FIDIC traditionally balanced risk philosophy, is actually not in use as originally drafted.

CLAUSE 3: THE ROLE OF THE ENGINEER IN THE NEW FIDIC RED & YELLOW BOOK

The role of the (Independent) "Engineer" changed from the 1992 to the 1999 Red Book in such manner, that the Engineer now acts in the interest of the Employer and no longer has the duty of impartiality.

Clause 3.1 (a) of the Conditions of Contract of the new books states that "Except as otherwise stated in these Conditions: (a) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer", with the exception of Clause 3.5, where the Engineer is required to make "a fair determination in accordance with the Contract, taking due regard of all circumstances" whenever these Conditions provide that the Engineer shall proceed in accordance with Sub-Clause 3.5.

Since many years there is an ongoing debate within FIDIC and beyond on the role of the (Independent) Engineer which appears not to be over. The Anglo-Sax-

on concept of an independent Engineer guiding the project and deciding on right or wrong between the Employer and the Contractor has never been accepted in many civil law countries where the direct two party system of Employer and Contractor has always been the norm. It further needs to be considered in this respect that the Engineer is usually paid by the Employer only.

However it is the intention and philosophy of FIDIC, that the Engineer shall be a registered member of FIDIC and as such an independent person in terms of financial, technical and relation aspects. Unfortunately this is not the case in many projects.

CLAUSE 20.1: NOTICES UNDER THE FIDIC CONTRACT

If the Contractor considers himself entitled to a claim under a FIDIC - contract, it is of prime importance for him to be aware that he is obliged to give Notice to the Employer strictly within the time periods stipulated in the contract. Clause 20.1. states:

"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Employer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance."

A failure of the Contractor to provide claim notices within the 28 days provided by clause 20.1, has the following consequences:

"If the Contractor fails to give notice of a claim within such period of 28 days, the

Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim."

It happened not the first time that a claim of high value is denied on basis of failure of giving notice, although otherwise the Contractor would be entitled to.

Therefore it is of prime importance under a FIDIC contract to "Give always notice after an event that could give rise to a claim!" <<

Sources:

- > The Conditions of Contract for Construction, FIRST EDITION 1999
- > The Conditions of Contract for Plant and Design-Build, FIRST EDITION 1999
- > The Conditions of Contract for EPC/Turnkey Projects, FIRST EDITION 1999