

The top 10 things you need to know about FIDIC

Briefing note

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1. What does “FIDIC” stand for

Fédération Internationale Des Ingénieurs – Conseils (from French, the International Federation of Consulting Engineers)

2. The history of FIDIC

Founded in 1913 by three countries, each wholly or partly francophone, specifically Belgium, France and Switzerland. There are now 78 Member Associations from all over the world.

Currently located at the World Trade Centre in Geneva, Switzerland. Further details are available at www.fidic.org.

3. What does FIDIC do?

FIDIC is a global representative for the consulting engineering industry, promoting the business interests of firms supplying technology-based intellectual services for built and natural environments alike.

FIDIC is well known for its work drafting standard form Conditions of Contract for the worldwide construction industry, particularly in the context of higher value international construction projects, and is endorsed by many multilateral development banks (“MDBs”).

Companies and organisations belong to FIDIC national member associations which now represent other professionals, such as architects. FIDIC also has affiliate members interested in its work, such as lawyers and insurers.

FIDIC organises conferences, seminars and training courses and, until 2002, FIDIC ran FIDICdirect, the International Directory of Consulting Engineers, which is now run by ICONdirect. (see www.icondirect.net)

4. What does the FIDIC Suite of Contracts cover?

A substantial amount. In 1999, FIDIC published a completely new suite of contracts, the ‘Rainbow Suite’, various contracts having been updated. These include:

- **The Red Book:** Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (1st Ed 1999).
- **The Pink Book:** Harmonised Red Book (MDB Edition) Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (Version 3 2010) – for use as part of the standard bidding documents by the Multilateral Development Banks only. The Islamic Development Bank and the World Bank worked with FIDIC in developing this contract.
- **The Yellow Book:** Conditions of Contract for Plant and Design-Build – for electrical and mechanical plant, and for building works, designed by the Contractor (1st Ed 1999).
- **The Silver Book:** Conditions of Contract for EPC/Turnkey Projects (1st Ed 1999).
- **The Orange Book:** Conditions of Contract for Design – Build and Turnkey (1st Ed 1995).

- **The Gold Book:** DBO Contract - Conditions of Contract for Design, Build and Operate Projects (1st Ed 2008).
- **The Green Book:** Short form of Contract (1st Ed 1999).
- **Sub-consultancy Agreement:** (1st Ed 1992).
- **The White Book: Client/Consultant Model Services Agreement:** (4th Ed 2006).
- **The Blue – Green Book:** Dredgers Contract (1st Ed 2006).
- **Conditions of Subcontract for Construction:** Used in conjunction with The Red Book and The Pink Book (Test Book 2009).

5. What are the most popular forms & the FIDIC approach to risk allocation?

The most well known forms of FIDIC Contract are The Red Book (traditional conditions), The Yellow Book (D&B conditions) and The Silver Book (EPC/turnkey conditions).

The contract structure is generally the same:

- General provisions (Clause 1)
- The Employer, Employer's Administration OR Engineer, Contractor, Nominated Subcontractors OR Design (Clauses 2-5)
- Staff and labour, Plant, materials and workmanship (Clauses 6-7)
- Commencement, delays and suspension, Tests on completion, Employer's taking over, Defects Liability, Tests after completion (Clauses 8-11/12)
- Measurement and Evaluation OR Variations and Adjustments, Contract Price and Payment (Clauses 12-14)
- Termination by Employer, Suspension and Termination by Contractor (Clauses 15-16)
- Risk and Responsibility (Clause 17)
- Insurance (Clause 18)
- Force Majeure (Clause 19)
- Claims, Disputes and Arbitration (Clause 20)

The 1999 Red Book is globally the most commonly used standard form contract for construction and engineering works where most or all the works are designed by, or on behalf of, the employer.

When profiling risk, FIDIC has historically allocated risk based on which party is best placed to assume that risk; in contrast, The Silver Book adopts a market practice approach, placing the majority of risk on the contractor, primarily including design and design co-ordination, along with any employer design.

With The Red Book and The Yellow Book, the employer takes on risks such as unforeseeable ground conditions, unforeseeable operations of the forces of nature, force majeure (such as acts of war, terrorism and natural disasters) planning and environmental permits, and changes to the law. The party who prepares the design takes on the responsibility for its defects.

6. Traps for the unwary: No. 1 – Commencement Date

A feature of The Red Book 1999 edition is the reorganisation of various contractual

terms, now following a more logical format. Accordingly, Clause 8 now deals with all topics related to starting work, programming, delays and suspension during the course of the works.

Clause 8.1 asserts a default Commencement Date of 42 days from the date on which the contractor receives the Letter of Acceptance, unless particular conditions provide otherwise. The engineer gives the contractor at least 7 days notice of the Commencement Date. The contractor commences work “as soon as reasonably practicable” after the Commencement Date, proceeding with works “with due expedition and without delay”.

The Red Book proceeds on the assumption the project will be competitively tendered and the employer will send a Letter of Acceptance in relation to the accepted tender. Whilst the contract contains a pro-forma Letter of Tender there is no pro-forma for the Letter of Acceptance. The contract assumes this letter, signed by the employer, will equate to unconditional acceptance of a tender. The contract therefore assumes contractual relations between the parties have been created prior to signing the contract, based on the Letter of Acceptance.

In practice, many contracts are negotiated with no tendering whatsoever, or with significant post-tender negotiations. FIDIC has introduced the requirement to reach agreement and then create a Letter of Tender and Letter of Acceptance prior to signing the contract, which is somewhat naïve, and it would be preferable to include these as agreed terms in the contract. The contract can easily be amended but it is suggested it would be far simpler if FIDIC followed the model of other standard form contracts, introducing the Commencement Date as agreed and therefore inserted into the contract particulars.

Caution must be taken when drafting the Letter of Intent: it is common for this letter to mark the beginning of on site works, though negotiations of minor issues have yet to be finalised; it is therefore critical this letter not be interpreted as the Letter of Acceptance, so drafting must be meticulous.

The Harmonised MDB Pink Book rewrites Clause 8.1, a point of interest to consider. The amended clause recognises the following conditions precedent must be complete before the works start:

- Contract signed by both parties.
- Receipt by the contractor of “reasonable evidence of the employer’s financial arrangements”.
- Site possession given to the contractor.
- Provision of any advance payment and corresponding guarantee/bond.

The amended contract asserts the contractor’s option to terminate if these matters are not dealt with within 180 days of the Letter of Acceptance, introducing additional complexity to starting work and ignoring the possibility that site possession is not always necessary – or in fact advisable – at the outset of contractor works.

For those using the unamended Red Book, it is important to ensure neither party introduces additional or non-agreed terms into either the Letter of Tender or the Letter of Acceptance. The content of these letters clearly has contractual effect.

It is also important to check employer requirements and specifications interface with contractual terms as envisaged by FIDIC. The following clauses rely either on the content of the specification or generally cross-refer to the specification:

- Definition of 'Employer's Equipment' (clause 1.1.6.3)
- Permissions obtained by employer (clause 1.13(a))
- Opportunities for works by others (clause 4.6)
- Values for emissions and discharges (clause 4.18)
- Details of employer's equipment and free-issue materials (clause 4.19)
- Criteria for designers (Yellow Book – clause 5.1)
- Technical documents to be included in contractor's documents and language for contractor's documents (Yellow Book – clause 5.2)
- Contractor's documents to be submitted for review and/or approval (Yellow Book – clause 5.3)
- Other standards for compliance (Yellow Book – clause 5.4)
- Training to be provided for employer's personnel (Yellow Book – clause 5.5)
- Numbers and types of copies of as-built drawings (Yellow Book – clause 5.6)
- O&M manuals (Yellow Book – clause 5.7)
- Arrangements for staff and labour (clause 6.1)
- Facilities for staff and labour (clause 6.6)
- Payment of royalties (clause 7.8)

7. Traps for the unwary: No. 2 – Notices: Conditions Precedent

The most controversial innovation of the FIDIC 1999 Red Book is not amplification or amendment to the Extension of Time provisions but the requirement under Clause 20.1, which is a condition precedent to any claim for Extension of Time or Cost.

Reference to Clause 20.1 elsewhere in the contract demonstrates that if the contractor is not compliant he forfeits any entitlement to an extension of time or cost irrespective of relevant circumstances.

Clause 20.1 states a contractor

"shall give notice to the Engineer, describing the event or circumstances 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".

Accordingly, it is absolutely clear contractors must provide, and be alert to, notices under Clause 20.1 as soon as possible and remain so throughout the contract. The only area in which the contractor is given any leeway is where it was reasonable to conclude he could not have been aware of the event or circumstance giving rise to the entitlement to extra time and/or cost. It is suggested that a prudent contractor should adopt the practice of having at least 1 review in every 28 day period to assess whether any notice ought to be

given under contract.

Although not a condition precedent of the entitlement to make a claim, Clause 20.1 requires the contractor to keep records, making those records available to the engineer.

Within 42 days of the contractor becoming aware (or should have become aware) of the claim, or over a longer period if the engineer agrees, the contractor must send a fully detailed claim including supporting particulars. This claim will be treated as interim but it must be updated at monthly intervals. The final claim must be sent within 28 days after the end of the effects resulting from the event or circumstance that gave rise to the claim.

The requirements to submit this claim within 42 days and to update the claim are not conditions precedent in the same way as the initial notice, though it is clear failure to comply with this requirement will prejudice the contractor's position.

The engineer has 42 days after receiving the claim to respond with approval or disapproval and detailed comments. Monthly payment certificates will include the amounts the Engineer approves within the Contractor's claim.

8. Traps for the unwary: No. 3 – Application of Laws

When using a FIDIC contract, parties must consider how (i) the chosen law of contract and (ii) the local laws will affect the interpretation of the terms of the contract. *Will there be a conflict between the contractual terms and the applicable law?* Where necessary, amendments should be made. For example:

- If using the FIDIC contract in the UAE, the Emirates Code for Civil Transactions (brought into force on 16 December 1985 by Law No.5/1985) allows courts broad powers to change the level of liquidated and ascertained damages the parties have agreed to under the contract.
Article 390 of the Civil Transactions code provides:
*"(1) The contracting parties may fix the amount of damages by expressly stating it in the contract or in the subsequent agreement without prejudice to the provision of the law.
(2) The Judge may in all cases, upon the request of one of the parties, amend this agreement in order to adjust the amount of compensation to the harm incurred. Any agreement to the contrary shall be null and void."*
- If using a FIDIC contract in the UK, the dispute resolution procedures will not comply with Part II of the Housing Grants Construction and Regeneration Act 1996 (known as the "Construction Act"). Where a contract falls within the definition of a "construction contract", the Construction Act requires the contract to provide for the parties' right to refer a dispute to adjudication. In the absence of a compliant term, the Construction Act will impose the statutory scheme for adjudication into the contract.
- If using the FIDIC subcontract in the UK, the 'pay when paid' clauses found within the subcontract will breach the Construction Act: The Construction Act prohibits the use of such clauses in 'construction contracts'.
- If English law is the governing law of contract, deletion of the 'fitness for purpose' clause may not be sufficient to remove the performance standard from the contract.

Under English law, a fitness for purpose obligation may be implied unless the contract contains an express alternative standard; in the UK, it is common practice for construction contracts to include a lower standard of 'reasonable skill, care and diligence'.

- The FIDIC contract excludes either party's recovery of loss of profit and loss of contract (save for cases of fraud, deliberate default or reckless misconduct). Under English law, this could mean the contractor is potentially unable to recover its direct loss in a claim for damages for breach of contract where the employer has breached the contract by omitting part of the contract works. Parties using FIDIC should look carefully at the limitation on liability clauses and consider whether they wish to exclude recovery of both direct and indirect loss of profit claims and whether they are prepared to cap liability in the ways proposed.

Additionally, the parties should consider the FIDIC clause relating to *adjustments for changes in legislation*.

- One potential situation would be where substantial parts of the plant / equipment / components of the build are manufactured in another country and then transported to the project. The mechanism in the contract for dealing with any impact on the works (delays or additional costs) resulting from changes in the law applies only in relation to the 'Laws' of the country where the *project* is located. Changes in the law of another country which affect the plant / equipment / components of the build being manufactured elsewhere will not be caught unless bespoke drafting is included in the contract.
- Another area of concern is the narrow drafting of 'Laws', defined as "all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority". This is not particularly broad and may not, for example, include guidance from the Health and Safety Executive or the Environment Agency where the national law is English. Parties should consider broadening the definition of Laws.

9. How do Dispute Resolution Procedures work under FIDIC contracts?

Disputes can be adjudicated by referral to a Dispute Adjudication Board (DAB). The DAB will comprise of one or three members, the default position being three. (Clause 20.2)

How are the DAB members appointed? The contract may include a list of potential members, from which the board is selected. If three members, each party nominates one member for approval by the other party. Parties and members agree on the appointment of the third member, who will be chairman. (Clause 20.2.)

The form of the DAB appointment is the General Conditions of Dispute Adjudication Agreement, as set out in the contract Appendix, entered into by the parties and the member, a Tri-Partite Agreement (TPA).

Can DAB members be replaced? Yes, parties can agree to replace a member at any time, or if a member declines to act, dies, resigns, on disability or termination of a

member's appointment.

What is the effect of the DAB decision? The decision is binding, and must be complied with immediately, until revised by amicable settlement or arbitration. Parties must give effect to it. If no notice of dissatisfaction is served, it is final and binding. (Clause 20.4.)

Unless settled amicably, any dispute in respect of which the DAB decision (if any) has not become final and binding shall be finally settled by international arbitration. The Rules of Arbitration of the International Chamber of Commerce (ICC Arbitration) applies, with the appointment of three arbitrators (clause 20.6).

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We are always delighted to provide you with further advice in relation to FIDIC!

More information

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