

The FIDIC Contracts Guide

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I. INTRODUCTION

The FIDIC Contracts Guide is dated 2000 but actually became available mid-2001. It is the official guide to the 3 new FIDIC standard forms of Conditions of Contract dated 1999, viz.:

- Conditions of Contract for Construction (New Red Book)
- Conditions of Contract for Design-Build (New Yellow Book)
- Conditions of Contract for EPC/Turnkey Contracts (Silver Book)

It was decided at an early stage to have just one Guide for all the three New Books, which have been produced as a suite, instead of a separate guide for the individual Books, which was the case for the earlier Red, Yellow and Orange Books. Having one Guide for all three Books enables direct comparison of the differences between the Books, and saves repetition when the wording in the three Books is the same.

As it covers the 3 Books it has been necessary to use abbreviations for the 3 Books. So you will find throughout the Guide the following abbreviations:

- CONS: Conditions of Contract for Construction, which are recommended for building or engineering works where the Employer provides most of the design. However, the works may include some Contractor-designed civil, mechanical, electrical and/or construction works.
- P&DB: Conditions of Contract for Plant and Design-Build, which are recommended for the provision of electrical and/or mechanical plant, and for the design and execution of building or engineering works. However, the works may include some Employer-designed works.
- EPCT: Conditions of Contract for EPC'/Turnkey Projects, which may be suitable for the provision on a turnkey basis of a process or power plant, factory, infrastructure or other type of project where (i) a high degree of certainty of final price and completion time is required, and (ii) the Contractor takes total responsibility for the design and execution of the project.

Each of the above 3 New Books comprises three sections, viz.:

- General Conditions, which are intended for inclusion unchanged in any contract, and where the clauses hopefully apply to the great majority of contracts of the relevant type;
- Guidance for the Preparation of the Particular Conditions ('GPPC'), which provides some basic guidance on what (if any) provisions may be appropriate for the contract's Particular. Conditions, including some example texts that are not repeated in the Guide;
- forms for Letter of Tender, Contract Agreement and Dispute Adjudication Agreements.

The General Conditions recognise that provisions in tender documents for a particular project may differ from the standard 'General Conditions', and the intention is that changes and added or deleted provisions should be made in the Particular Conditions.

The Guide is therefore intended to provide general guidance and comment concerning the clauses FIDIC has included in these 3 standard forms, where applicable to indicate why any given provision has been included, and what was its intention. The Guide also is intended to indicate circumstances where a provision in the General Conditions should not be used, or should be amended, and it includes guidance and sometimes text of how a provision should be modified.

As we go through the Guide, you will see that it also includes a wealth of other useful information - far beyond simple commentary on the standard clauses - for those involved in procurement of construction projects and in preparing and dealing with contract documentation.

2. The author

Before we look at the Guide, it is in its place to say a word about its author. The Guide is more or less the sole work of one man, Peter Booen, of FIDIC's Contracts Committee. The Contracts Committee decided in 1998, after the Test Editions of the New Books were complete, that a Guide should be produced. Peter gamely took on the task. Certainly other members have contributed and reviewed the document, but by and large this monumental work of some 350 pages has been written and assembled by one man. Very tragically, Peter Booen died during the spring of 2002.

Peter Booen was a civil engineer by training, but worked for most of his career with the contractual aspects of construction projects. He has written and administered many engineering and construction contracts, and gathered a vast amount of experience over some 35 years. He also acted as adjudicator, conciliator, expert witness and dispute board member. From 1993 he was actively involved with FIDIC, devoting freely an enormous amount of time and effort on FIDIC's behalf. He was principal drafter of the Orange Book, published in 1995, and its Guide, and he was also principal drafter of the three New FIDIC Contracts of 1999. FIDIC relied heavily upon him, and his vast knowledge, not only for the drafting of contracts, but also at seminars of this type, on training courses, answering contractual queries, and numerous similar tasks.

His last work, the Guide, is therefore rather a fitting tribute to his enormous knowledge, energy and devotion. When we look further into the rich and extensive content of the Guide, I believe you will agree with me that it is a tremendous achievement, and all the more remarkable for being an almost one-man effort.

3. Layout of the Guide

If you open the Guide at any page somewhere in the middle - e.g. at page 168 - you will see that the texts of the 3 New FIDIC Books are printed side by side. Below each Sub-clause of the Books is the commentary on that sub-clause. So the Guide includes the full standard General Conditions of the 3 New Books (which means that if you carry the Guide around with you, you don't have also to carry any of the other New Books as well). It also means that one can see directly if there are any differences between the text of any Sub-clause in the 3 Books. For example (page 168) the text of Sub-clause 8.1

'Commencement of Work' is identical for CONS and P&DB, whereas it is slightly different for EPCT.

You may remember that the 3 New Books all have identical wording except when different wording is necessitated by the different purposes of the Books. Differences are attributable to, for example:

- the different names of some of the documents comprising the Contract
- the different responsibilities for design
- the different allocation of risks, and
- EPCT has no 'Engineer', or equivalent.

The comment has been made that it would be easier to use if the texts of the New Books and the commentary had been in different colours. We wished this to have been done, but for some technical computer or printing reason it unfortunately is not so. I am told that the coloured text was unclear on-screen, which is of course where many will be looking at the document. It also would have been better if the pages were marked or tabulated to indicate which Sub-clause is being dealt with on that page. A further improvement might be to have a spiral binding, so that the pages can lie flat when open. FIDIC will endeavour to solve these problems at the next re-printing.

You may also notice the box immediately below the texts of the Sub-clause. In this box you may see 'RB', 'YB' or 'OB' plus a number. This will help those who are familiar with the Old Books, namely the old 'Red Book', old 'Yellow Book' and 'Orange Book', to locate the Sub-clause in those old Books which corresponds to this Sub-clause in the New Books.

4. Contents of the Guide

Before we look at the particular commentaries to any of the Sub-clauses, let us go back to the beginning of the Guide to see what other useful information this 'fount of knowledge' actually contains:

- If we start at page 4 we see a practical and useful comparison of the main features of the 3 Books.
- Selection of the appropriate Book is critical to the success of a project, and the 'Introduction' on page 5 leads into FIDIC's way of answering the question, "Which Book should be used for my project?" On pages 6-8 are set out a series of questions, the answers to which should indicate which is the appropriate Book to use.
- Pages 9-12 entitled 'Project Procurement' contain a useful commentary on the basic questions of procurement strategy. The commentary indicates the importance of reviewing alternative procurement options before selecting the appropriate strategy for the project in question, and thereafter selecting the appropriate FIDIC Book. It concludes on page 12 with a list of circumstances when FIDIC definitely does not recommend and warns against the use of the EPCT Book (the P&DB Book should normally be used instead).
- Pages 13-16 entitled 'Recommended Procedures' contain a series of charts (taken from the FIDIC publication 'Tendering Procedure' 1994) showing the recommended procedures: for prequalification of

tenderers, obtaining tenders, and opening and evaluating tenders. These charts basically apply to tendering for CONS (Red Book) contracts. For P&DB and EPCT contracts the processes are somewhat different as tenderers usually have to submit details of design proposals, which have to be examined and assessed, and the design remains the responsibility of the Contractor.

- Pages 17-20 entitled 'Procurement Documentation' contains an instructive commentary on the documentation required for the prequalification and tendering procedures. It concludes with some good advice about managing the whole tendering procedure.

- Pages 21-40 contain, first, an example form for the 'Letter of Invitation to Tender', then - more importantly - a set of example forms for the complete 'Instructions to Tenderers' for use with each of the 3 New Books. These example forms are intended as a model to assist those preparing the 'Instructions' for any particular contract.

You will realise by now that this Guide is far more than just a commentary to the Clauses in the New Books. It is, in fact, a rather comprehensive 'procurement manual', giving the 'best recommended practice for the procurement of international construction projects'. Peter Booen liked to call it, a 'procurement-learning book', and, indeed, it gives instruction on nearly everything one should learn and know about procurement of such projects.

All of a sudden, at page 41, the commentary on the Sub-clauses of the FIDIC New Books actually begins! As mentioned, it would have been useful if markers or tabs could have indicated the various sections and Clauses, but perhaps one can attach one's own. The text of the 3 Books, followed by the commentary on each Sub-clause, continues all the way to page 317. Thereafter, pages 318-338, follows the text and commentary on the 'Appendix' to the New Books, i.e. the 'General Conditions of Dispute Adjudication Agreement' and its Annex, the 'Procedural Rules'.

We will return to the commentary, but a brief look at two remaining useful sections of this 'monumental' Guide:

- Pages 339-346 contain a glossary of words and phrases used in the fields of construction, consultancy, engineering and associated activities. One or two of the definitions may be slightly controversial, but the list should prove most useful to many in the industry, particularly newcomers and those from countries where English - as spoken in Europe - is not their home language. These definitions are not necessarily those found in the 'Definitions' at the beginning of the New Books.

- Finally, pages 347-353 contain a useful index to where subjects and terms can be found in the Sub-clauses in the 3 Books, both in which Book and in which Sub-clause as well as on which page of the Guide.

5. Commentary on Sub-Clauses of New Booksx

Having noted the many valuable other documents contained in this Guide, let us now turn to the main purpose, which is the commentary on the provisions contained in the various Sub-clauses of the New Books. This starts on page 41 and continues until page 317. (Thereafter, the clauses dealing with the General Conditions for the DAB are commented upon on pages 318-338).

When going through the commentary you may notice that some matters are repeated, where a topic relates to different Sub-clauses. Such repetition assists readers studying a particular Sub-clause by avoiding undue cross-referencing.

Clause I General Provisions - pages 41-73

Starting then on page 41, the commentary deals with 'Clause I General Provisions' of the New Books. First you find Sub-clause 'I. 1 Definitions' for the 3 Books - CONS, P&DB and EPCT - printed in their 3 columns at the top of the page. This is followed by the commentary in two columns.

We will not have time to read the commentary now, but, as an example, you may note that the commentary to this Sub-clause says 'In each Book, only those words and expressions which are used many times are defined in this Sub-clause these words and expressions are identified by the use of Capital initial Letters.... Therefore, the Contract Documents should use capital initial letters for words and expressions which are intended to have these defined meanings'. Thus words without capital initial letters have their natural meaning, and not necessarily the meaning defined in this Sub-clause.

Turning to page 42 we find a list in alphabetical order of all the defined words/expressions used in the 3 Books, together with the Sub-sub-clause where each is defined. (All good contracts start with definitions of the important terms used, so that everyone knows exactly what is meant by each term).

Page 43, showing the text of the 3 Books, clearly indicates where the wording is the same, and where it is not, in the 3 Books. For example, there is no 'Letter of Acceptance' or 'Letter of Tender' in the EPCT Book. On page 44, the text from the Books ceases and the commentary takes over.

The definitions and comments thereon continue until page 56/57. On page 56 you may note that EPCT does not include a definition for 'Unforeseeable', which is a reflection of the extra risk that the Contractor assumes under the EPCT Book. Here the commentary states: "The adjective 'Unforeseeable' is defined in terms which refer to 'an experienced contractor'... The definition does not refer to what the Contractor claims to have foreseen, or to what anyone foresaw, it refers to what was 'reasonably foreseeable' by an experienced contractor'.

All the Sub-clauses of Clause 1 of the Books deal with general matters. Under 'Communications' - 1.3 (a) is noted that 'all communications shall be in writing'. The commentary notes that 'if electronic transmission is acceptable, the agreed system is to be stated'. Sub-clause 1.5 'Priority of Documents' gives a clear picture of the names of the Contract Documents in the 3 Books, which reflects the typical difference in tendering/procurement between the Books.

We unfortunately have no chance (in this talk) of going through all the Sub-clauses and their commentaries, so we shall look at just a few provisions of particular interest.

Clause 2 Employer - pages 74-80

Clause 2 deals with the duties of the Employer, such as Sub-clause 2.1 - giving access to the Site to the Contractor. Typical of the commentary is that it points out that the Employer "is only required to give

the Contractor the 'right' of access to the Site ... it does not entitle the Contractor to an access route suitable for his transport".

New provisions, pages 77-78, are Sub-clause 2.4 'Employer's Financial Arrangements', and Sub clause 2.5 'Employer's Claims'. Regarding 2.4, the commentary notes that the Employer does not have to provide evidence that he can pay unless the Contractor requests such evidence. Normally one would not expect a contractor to demand such evidence. However, the provision is there to protect the Contractor in case there is doubt about an Employer's ability to pay the full Contract Price when, for example, considerable additional work has been ordered, or considerable price escalation - which is refundable to the contractor under the price escalation provisions - has occurred. The commentary points out that if the Employer fails to submit the evidence "Subclause 16.1 entitles the Contractor to suspend work, or reduce the rate of work, or ultimately to terminate under Sub-clause 16.2.

Sub-clause 2.5 prescribes a new procedure to be followed by the Employer in case he wishes to claim any payment or extension of a 'guarantee period' from the Contractor.

Clause 3 The Engineer - pages 81-93

Clause 3 - see page 81 - deals with the Engineer's duties for CONS and P&DB. The commentary points out that the Engineer "does not represent the Employer for all purposes - for example, the Engineer is not entitled to amend the Contract. However, he is deemed to act for the Employer". There is no Engineer under EPCT, but there should be an 'Employer's Representative'. When we look at Sub-clause 3.5 - page 89 - we see considerable discussion about the 'fair determination' to be made by the Engineer (or by the Employer under EPCT) when either Party has presented a claim in respect of money or time. This commentary is followed on pages 90 - 93 by a very useful list of all those Sub-clauses under which either Party may have an entitlement to claim. The list is given for CONS and P&DB, but an asterisk marks those that also apply to EPCT.

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Sub-Clause 4.2 Performance Security - pages 97-102

Moving on past page 97 where Sub-clause 4.2 calls for a Performance Security from the Contractor for full and complete performance of the Works, we find on pages 99 to 102 extensive commentary on such securities, including discussion on the example forms of Performance Security annexed to each GPPC in the Books. Annex C, which may be called a 'conditional demand guarantee', typically would be issued by a bank, and Annex D, which is a 'surety bond', would typically be issued by a credit insurance company.

Sub-Clause 4.12 Unforeseeable Physical Conditions - pages 114-118

Pages 114 to 118 deal with Sub-clause 4.12 'Unforeseeable Physical Conditions'. It is still numbered '12' in honour of the infamous Clause 12 in the Old Red Book dealing with the same subject, which has become known as 'the lawyer's favourite'. On page 115 we can see immediately that CONS and P&DB allow for the occurrence of unforeseeable physical conditions, whereas under EPCT the Contractor has (unless otherwise stated in the Contract) accepted total responsibility for all unforeseen difficulties that may arise. On page 117, we can read in the commentary "The 'physical conditions' are defined widely, so as to include natural sub-surface conditions, natural and artificial physical obstructions, and the presence of chemical pollutants, for example. The physical conditions are those which the Contractor 'encounters on the Site', so they must be a type of condition which is physical in the sense that it is

'encountered'. Climatic conditions on the Site, such as the direct effects of rainfall, are excluded". 'Unforeseeable' is defined as meaning 'not reasonably foreseeable by an experienced contractor by the date for submission of the Tender'.

A new provision in the penultimate paragraph of Sub-clause 4.12 allows the Engineer to review 'whether other physical conditions in similar parts of the Works (if any) were more favourable than could reasonably have been foreseen ...'If so, these costs 'saved' may be deducted from the extra costs reimbursed for unforeseen conditions (but may never be more than the extra costs).

Clause 5 - pages 132-149

Pages 132-136 deal with the unfortunate - but sometimes necessary - arrangement of the 'Nominated Subcontractor' in CONS, Clause 5. We do not reckon with such an arrangement for the other two contracts. For the P&DB and EPCT, we have therefore used Clause 5 for 'design', remembering that for these two contracts the Contractor is responsible for the design, and therefore the requirements for the design must be specified.

Clause 10 Sample Forms - pages 188/203

Moving on to pages 189 bottom/ 190 top we see the commentary provides a 'Sample Form of Taking-Over Certificate' and for 'Taking-Over Certificate for a Section'. On page 203 top we find a (2 line) 'Sample Form of Performance Certificate'.

Clause 12 - pages 205-216

Clause 12 on pages 205-210 deals with 'Measurement and Evaluation' for CONS, as this contract form is for a remeasure-type contract. Such a clause is not normally required for a P&DB or EPCT contract where payment usually follows a 'schedule of payments', so we have used Clause

number 12 pages 211-216 to cover 'Tests after Completion' for these two contracts (which tests are not required for CONS).

Sub-Clause 13.8 Adjustment for Changes in Cost - pages 228-231

Pages 228-231 show and give commentary on Sub-Clause 13.8 'Adjustments for Changes in Cost', which are based on a typical formula for price adjustment versus time from the base date. This applies to CONS and P&DB, but not to EPCT where normally price adjustment will not be permitted.

Clause 20 Claims and DAB -pages 299-338

Moving on to pages 299-302 we find Sub-Clause 20.1 setting out the requirements for claims from the Contractor. Here there is introductory comment followed by the Sub-clause wording. Of note is that the same wording appears in all 3 Books. Pages 303-317 deal with the DAB, followed by 'Amicable Settlement' attempt and then 'Arbitration'.

Pages 318-331 deal with the Appendix to the Books, i.e. 'General Conditions for Dispute Adjudication Agreement' and the relevant commentary, followed on pages 332-338 with the DAB's 'Procedural

rules'. One can see on page 333 the difference between the 'Standing DAB' proposed for the majority of CONS contracts, and the 'Ad Hoc DAB' suggested for the majority of P&DB and EPCT contracts.

6. Conclusion

Most of the Guide thus comprises detailed commentary that is intended to assist all those involved in the procurement and execution of the construction Works:

- The Employer's team selecting the New Book and writing the tender documents for the Contract
- The Tenderers' teams attempting to foresee the consequences of being awarded the Contract
- 'Employer's Personnel' and 'Contractor's Personnel' managing the Contract during the execution of the Works; and
- DABs and others involved in the avoidance and resolution of disputes under the Contract.

After this brief run-through of the Guide, it will be obvious that it is a monumental text-book of procurement/contractual knowledge and wisdom, written by one who had a vast and varied experience in this field. It will certainly prove invaluable to many in the international construction industry. It is a masterpiece, and a living tribute to its author, Peter Booen.