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Projects

A New FIDIC "Golden Book" for Design, Build and Operate (DBO) Projects

Introduction

FIDIC has published its long awaited Conditions of Contract for Design, Build and Operate Projects (**the DBO Contract**) in a pre-press edition. The DBO Contract was mooted back in 2005 leading up to the FIDIC Conference in Beijing, where a panel from the FIDIC drafting task force (along with Bernard Ang of Pinsent Masons) presented a workshop to introducing the DBO Contract in comparison with FIDIC's 1999 suite of works contracts (the Silver, Yellow, Red and Green Forms) (**the 1999 1st Edition**).

The DBO Contract aims to build upon the advantages of the DBO procurement approach which combines design, construction and long-term facility operation and maintenance into a single contract with one legal entity (the **Contractor**).

This was preferred over an approach which simply made use of the current FIDIC design-build form (the Yellow Book) and adding a new FIDIC "Operation" form, as the latter approach would warrant two separate contracts instead of a single DBO Contract.

Advantages of DBO

The potential advantages for a client procuring through the DBO mode are widely acknowledged, such as :

- a more predictable time schedule;
- single point responsibility, including the reduction of co-ordination and interface risks between design-build on the one hand, and operation on the other;
- a higher degree of budget certainty (both capital and recurring) at an early stage, with less risk of cost over-runs for the procuring entity; and
- an incentive on the Contractor to design and build to facilitate long term future operation and to optimize the whole life-cycle costs of the facility instead of simply designing to fitness and to pass tests on completion, and in the process allowing considerable scope for innovation by the DBO Contractor.

Two Health Warning(s)

Note that this is only a pre-press edition, published to provide a working document for FIDIC to launch seminars before the first edition is launched sometime in 2008. This edition is incomplete, in particular the Notes for preparing Particular Conditions are not yet drafted; hence the express warning by FIDIC that this edition *is not intended for contract use*.

Furthermore, it is important to note that the Golden Book is not a proper reference. Those who attended our Annual Construction and

Engineering Law seminars may recall we coined the (then anticipated) DBO Contract "the Golden Book" on the basis it must be a higher level than the "Silver Book" EPC/turnkey contract. FIDIC discourages the use of these short form names; however in practice these names are popularly used given the colourful sleeves for FIDIC forms (including the unmistakably gold hues for this contract form).

Use of the DBO Contract

The use of this form of DBO Contract is based on some important assumptions, namely:-

- (1) The DBO Contract is intended for use in a greenfield rather than a brownfield development, with a 20 year operation period. It is therefore not suitable to be used without amendment for contracts which either deviate from the traditional Design-Build-Operate sequence (e.g. in a brownfield or Operate-Design-Build sequence), or where the Operation Period differs significantly from 20 years.
- (2) The Contractor is **not** responsible for financing the project nor for its ultimate commercial success. Market risk and volume risks are not assumed by the DBO Contractor who (it appears) is to be paid a pre-agreed price during the entire period for which he carries out operation and maintenance.
- (3) It also contemplates there may be a residual life at the end of the 20 year operation period, which means if it is used for some DBO projects without a residual life (e.g. a landfill to be operated to exhaustion) it needs certain amendments, particularly as regards the activities in the period leading up to the completion of the (20 year) "Operation Service Period" and the handover and testing at the end of this period.

Form of the DBO Contract

The documents making up the DBO contract are similar to that for the 1999 1st Edition, with the core documents made up of a Contract Agreement, General and Particular Conditions, Employer's Requirements and Contractor's Proposals, and (technical) Schedules.

However where it departs from the 1999 1st Edition is in the fact that the Particular Conditions are made up of two parts:

Part A - the "**Contract Data - Particular Conditions Part A**" replaces the "Appendix to Tender" in the 1999 1st Edition. The Contract Data is envisaged to be a more substantial document; more importantly Contract Data is to be provided by the Employer, whereas Appendix to Tender was to be filled in with the tender submitted by the Contractor.

Part B – Part B of the Particular Conditions contains the “**Special Provisions**” (with guidance notes to be drafted in due course). While Contract Data contains specific information referred to in the General Conditions, Special Conditions are anticipated to be more substantial in nature.

Drafting the Special Conditions

The Special Conditions in the DBO contract contain (in theory) greater detail over two parts, as compared to say the Silver Book for EPC Contracts simply because there are less “standard” terms in DBO contracts compared to EPC contracts. When looking at this pre-press edition, it is obvious that the FIDIC drafting group has included in the General Conditions only those provisions of an extremely general, wide-ranging nature which are likely to be appropriate to the majority of DBO contracts.

It is equally obvious that many employers or governments may require special conditions of contract or specific procedures; further the widely varied nature of projects which lend themselves to the DBO procurement mode (e.g. compare a wastewater DBO and a landfill DBO) will require very different provisions which cannot sensibly be contained in the General Conditions.

For this reason, the General Conditions will require substantial amendment and in the first trial edition to be published next year, FIDIC will include advice to drafters on how to add substantial Special Provisions to replace or supplement the clauses in the General Conditions.

Main Changes from the 1999 1st Edition

The changes will be the subject of a series of subsequent updates from Pinsent Masons; the most obvious changes we see include :-

- (1) The grant of a **license** to operate for the (20 year) operation period (new sub-clause 1.7) when the DBO is awarded, but with the license only coming into effect after completion.
- (2) Whole new provisions relating to **Operation Service Period** (a new Clause 10) which of course differ from the provisions during the design-build period.
- (3) It is now mandatory for Employers to detail their financial arrangements in a **Financial Memorandum** (previously such details were not strictly mandatory).
- (4) In addition to delay damages for late completion of the design-build portion, **damages** for inability to provide operation service are now included (new sub-clause 8.5).
- (5) Failure to reach **production outputs** and potential remedy for the “buy down” of the sub-par performance is now dealt with (new sub-clause 10.7)
- (6) A new provision dealing with adjustments for **changes in technology** (new Sub-clause 13.7).
- (7) The absence of a “**defects notification period**” (the FIDIC term for “defects liability period”). Because the Contractor is responsible for operating the facility he has built, instead of

transferring it over to the Employer, by necessity he will have to rectify defects which affect his operation.

- (8) The creation of the **Asset Replacement Fund** and **Maintenance Retention Fund**, both applicable during the Operation Service period.
 - The Asset Replacement Fund, a common feature of DBO contracts, seeks to secure the necessary funding to facilitate the timely replacement or renewal of major items of plant during the operation phase.
 - The Maintenance Replacement Fund, being security for the procuring entity - in effect money withheld from the Contractor to ensure that he carries out essential maintenance required under the Contract.
- (9) Wholly revamped clauses dealing with **Risk Allocation** (Clause 17) and **Exceptional Risks** (Clause 18), the latter being a modification of the Force Majeure clause (clause 19) in the 1999 1st Edition.
- (10) A wholly revamped **insurance** provision (clause 19, which differs from the clause 18 of the 1999 1st Edition) whereby the Contractor takes out the various insurances, rather than an option for either the Employer or the Contractor to effect insurance (as was the case under the 1999 1st Edition).
- (11) Last but not least, it is significant to note a softening of the absolute “**time-bar**” against late claims from contractors, allowing the Dispute Adjudication Board or DAB to disregard a non-compliance with the 28 day period if the “*circumstances are such that the late submission* (by the Contractor) *was acceptable*”. This is bound to elicit heated debate.

Conclusion

This pre-press edition of the eagerly awaited DBO Contract comes at a most opportune time when PPP is finally starting to gain some momentum across Asia, and will serve not only as a valuable base document for the drafting of project agreements which lend themselves to the DBO procurement approach, but often as an invaluable guide for DBO international best practice.

It is also interesting to note some of the “improvements” that FIDIC has taken on board with this DBO Contract – choosing to depart from the 1999 1st Edition for matters that are (strictly speaking) neither unique nor distinctive to DBO contracts, and hence raising the question whether some of these “improvements” should be imported into the 1999 1st Edition (or indeed whether this will be reflected in FIDIC producing a 2nd edition of the Silver, Yellow, Red and Green forms)?

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